(28,056)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 699.

FIDELITY TITLE AND TRUST COMPANY, PITTSBURGH, PENNSYLVANIA, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 7, 1921.

1 Court of Claims.

No. 33977.

FIDELITY TITLE & TRUST COMPANY, PITTSBURGH, PENNSYLVANIA,

vs.

THE UNITED STATES.

I. *History of Proceedings.*

On July 25, 1918, the claimant filed its original petition.

On November 26, 1918, by leave of court, the defendant filed a demurrer to claimant's petition.

On December 16, 1919, the demurrer was argued and submitted.

On January 13, 1919, the court filed an order overruling defendant's demurrer without prejudice, and allowing claimant sixty (60) days within which to file certain papers.

On March 10, 1919, the claimant filed its amended petition, and Exhibit "A," which are as follows:

II. *Amended Petition and Exhibit "A."*

Filed March 10, 1919.

To the Honorable the Chief Justice and the Judges of the Court of Claims:

The claimant, the Fidelity Title & Trust Company of Pittsburgh, Pennsylvania, is a corporation duly created and organized under the laws of the Commonwealth of Pennsylvania, and by leave of this Honorable Court, under its order dated January 13, 1919 (October Term, 1918), files this, its amended petition in the above entitled cause, and shows to the Court as follows:

I.

The claimant, the Fidelity Title & Trust Company, of Pittsburgh, Pennsylvania, is a corporation duly created and existing
2 under the laws of the Commonwealth of Pennsylvania, having been incorporated on the 27th day of November, 1886, under the provisions of a general act of the Assembly of the Commonwealth of Pennsylvania entitled "An Act to provide for the incorporation and regulation of certain corporations," approved April 20, 1874 (P. L., 73, No. 32), and the supplements thereto, the material part of which reads as follows:

Pennsylvania Constitution, Article 16.—Section VI.

"No corporation shall engage in any business other than that expressly authorized in its charter; nor shall it take or hold any real

estate, except such as may be necessary and proper for its legitimate business."

Acts of 1874, P. L. 73, No. 32.

An Act to provide for the incorporation and regulation of certain corporations * * *

Classes.

Section 2. The purposes for which the said corporation may be formed shall be as follows, and shall be divided into two classes: * * *.

Corporations for Profit.—Second Class.

The second class, those for—

* * * * * * *

XIX. The insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens, and incumbrances."

Notice to be Given.

Section 3. * * * Notice of the intention to apply for any such charter shall be inserted in two newspapers of general circulation, printed in the proper county, for three weeks, setting
3 forth briefly the character and object of the corporation to be formed, and the intention to make application therefor."

Insurance of Titles.

Section 29. Companies incorporated under the provisions of this Act for the insurance of owners of real estate, mortgages and others interested in real estate, from loss by reason of defective titles, liens and incumbrances, shall have the power and right to make insurances of every kind pertaining to or connected with titles to real estate, and shall have the power and right to make, execute and perfect such and so many contracts, agreements, policies and other instruments as may be required therefor."

Acts of 1881, P. L. 22, No. 26.

A supplement to an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and seventy-four.

Section 1. Be it enacted, &c., That all companies, incorporated under the provisions of said act, for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens and incumbrances, and whose capital

stock shall not be less than two hundred and fifty thousand dollars, be and they hereby are authorized:

First. To receive and hold on deposit, and in trust, and as security, estate real and personal, including the notes, bonds, and obligations of State, individuals, companies and corporations, and the same to purchase, collect, adjust and settle, sell and dispose of, in any manner, without proceeding in law or equity, and for such price and on such terms as may be agreed on between them and parties contracting with them; Provided, That nothing herein contained shall authorize said companies to engage in the business of banking.

Second. To make insurance for the fidelity of persons holding places of responsibility and of trust, and to receive upon deposit for safe keeping, jewelry, plate, stocks, bonds and valuable prop-
4 erty of every description, upon terms as may be agreed upon.

Third. To act as assignees, receivers, guardians, executors, administrators, and to execute trusts of every description, not inconsistent with the laws of this State or of the United States.

Fourth. To act as agents, for the purpose of issuing or countersigning the certificates of stock, bonds or other obligations, of any corporation, association, municipality, State or public authority, and to receive and manage any sinking fund thereof on such terms as may be agreed upon.

Fifth. To become sole surety, in any case where by law one or more sureties may be required for the faithful performance of any trust or office.

Sixth. To take, receive and hold, any and all such pieces of real property, as may have been the subject of any insurance made by such companies, under the powers conferred by their charter, and the same to grant, bargain, sell, and convey and dispose of in such manner as they may see proper.

Section 2. That whenever such companies shall receive and accept the office or appointment of assignees, receiver, guardian, executor, administrator, or be directed to execute any trust whatever, the capital of the said companies shall be taken and considered as the security, required by law for the faithful performance of their duties as aforesaid, and shall be absolutely liable in case of any default whatever.

Section 3. That any executor, administrator, guardian or other trustee, having the custody or control of any bonds, stocks, securities, or other valuables belonging to others, shall be authorized to deposit the same for safe keeping with said company.

Section 4. That whenever any court shall appoint said companies, assignees, receiver, guardian, executor, administrator, or to execute any trust whatever, the said court may in its discretion, or upon the application of any person interested, appoint a suitable person to investigate the affairs and management of the company so appointed,

who shall report to such court the manner in which its investments are made and the security afforded to those, by or for whom its engagements are held; and the expense of such investigation shall be defrayed by the said company, or the court may, if deemed necessary, examine the officers of the said company under oath or affirmation as to the security aforesaid.

Section 5. The said company shall keep all trust funds and investments separate and apart from the assets of the company, and all investments made by said companies as fiduciaries shall be so designated as that the trust to which such investment shall belong, shall be clearly known.

Section 6. Such companies, before exercising any of the powers conferred by this act, shall file with the secretary of the commonwealth a certificate of their acceptance of the same in writing, under their duly authenticated seal, accompanied by an affidavit of the treasurer of the said corporation, of the amount of cash capital which has been paid in under the provisions of their charter."

Acts of 1885, P. L. 111, No. 73.

An Act Authorizing trust companies to transact safe deposit business, and also to increase capital and change the par value of shares representing the same.

Section 1. Be it enacted, &c., That all companies incorporated under the laws of this Commonwealth, which are by their charters authorized to act as trustees, receivers, assignees, guardians and committees, be, and they are, hereby authorized.

First. To receive upon deposit for safe keeping jewelry, plate, stocks, bonds and valuable property of every description, upon such terms as may be agreed upon.

Second. To act as agents for the purpose of issuing or countersigning the certificates of stocks, bonds, or other obligations, of any corporation, association, municipality, State or public authority, and to receive and manage any sinking fund thereof, on such terms as may be agreed upon.

Section 2. That whenever such companies shall desire to increase their capital stock, they may do so according to the forms prescribed by law; Provided, the amount of capital stock after such increase shall not exceed two million dollars, and may change the par value of the shares to one hundred dollars each.

Section 3. Such companies, before exercising any of the powers conferred by this act, shall first accept the provisions of the Constitution of this Commonwealth, adopted December sixteenth, one thousand eight hundred and seventy-three, and shall file with the Secretary of the Commonwealth a certificate of such acceptance, in writing, under their duly authenticated seal."

Acts of 1889, P. L., No. 179.

An Act Supplementary to an act entitled "An act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and seventy-four, amending the twenty-ninth section of said act, so as to provide for the further regulation of and granting additional powers to all corporations now or hereafter incorporated under the provisions of the said act for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens and incumbrances.

Section 1. Be it enacted, &c., that section twenty-nine of an act, approved April twenty-nine, one thousand eight hundred and seventy-four, entitled "An act to provide for the incorporation and regulation of certain corporations," which reads as follows:

Insurance of Titles.

Section 29. Companies incorporated under the provisions of this act for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens and incumbrances, shall have the power and right to make insurances of every kind pertaining to or connected with titles to real estate, and shall have the power and right to make, execute, and perfect such and so many contracts, agreements, policies, and other instruments as may be required therefor, be and the same is hereby amended and extended so as to be and read as follows:

7 ### Insurance of Titles.

Section 29. Clause 1. Companies which may have been heretofore, or which may hereafter be, incorporated under the provisions of this act, for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens and incumbrances, shall have the power and right:

First. To make insurances of every kind pertaining to or connected with titles to real estate, and to make, execute and perfect such and so many contracts, agreements, policies and other instruments as may be required therefor.

Second. To receive and hold on deposit and in trust and as security estate, real and personal, including the notes, bonds, obligations of States, individuals, companies and corporations and the same to purchase, collect, adjust and settle, sell and dispose of in any manner, without proceeding in law or equity, and for such price and on such terms as may be agreed on between them and the parties contracting with them; Provided, That nothing herein contained shall authorize said companies to engage in the business of banking.

Third. To make insurance for the fidelity of persons holding places of responsibility and of trust, and to receive upon deposit for safe keeping jewelry, plate, stocks, bonds, and valuable property of every description, upon terms as may be agreed upon.

Fourth. To act as assignees, receivers, guardians, executors, administrators, and to execute trusts of every description not inconsistent with the laws of this State or the United States.

Fifth. To act as agents for the purpose of issuing or countersigning the certificates of stock, bonds, or other obligations of any corporation, association, or municipality, State or public authority, and to receive and manage any sinking fund thereof on such terms as may be agreed upon.

Sixth. To become sole surety in any case where by law one or more sureties may be required for the faithful performance of any trust, office, duty, action or engagement.

Seventh. To take, receive and hold any and all such pieces of real property as may have been, or may hereafter be, the subject of any insurance, made by such companies under the powers
8 conferred by their charter, and the same to grant, bargain, sell, convey and dispose of in any such manner as they see proper.

Eighth. To purchase and sell real estate and take chrge of the same.

Ninth. To act as security for the faithful performance of any contract entered into with any person, or municipal or other corporation, or with any State or Government, by any person or persons, corporation or corporations.

Tenth. To become sole security for the faithful performance of the duties of any national, State, county or municipal officer and to execute such bonds or recognizances as may be required by law in such cases.

Eleventh. To become security for the faithful performance of the duties of any clerk or employee of any corporation, company, firm or individual.

Twelfth. To become security for the payment of all damages that may be assessed and directed to be paid for lands taken in the building of any railway, or for the purposes of any railway, or for the opening of streets or roads, or for any purpose whatever where land or other property is authorized by law to be taken.

Thirteenth. To become security upon any writ of error or appeal, or in any proceeding instituted in any court of this Commonwealth, in which security may be required; Provided, however, that nothing in this act shall be so construed as to dispense with the approval of such body, corporation, court or officer, as is by law now required to approve such security; Provided, however, That before exercising

any of the powers hereby conferred, each such corporation shall have a paid up capital of not less than one hundred and twenty-five thousand dollars, an affidavit of which fact made by the treasurer thereof, shall be filed in the office of the Secretary of the Commonwealth, and each such company, heretofore or hereafter incorporated, shall file in the office of the Secretary of the Commonwealth a certificate of its acceptance hereof, made by formal resolution adopted at a regular or called meeting of the directors, trustees, managers, or other proper officers thereof, and certified under the corporate seal of such company, and a copy of such affidavit
9 and of such resolution certified under the seal of the office of the Secretary of the Commonwealth shall be evidence of compliance with the requirements hereof.

Clause II. That whenever such companies shall receive and accept the office or appointment of assignees, receivers, guardian, executor, administrator, or to be directed to execute, any trust whatever, the capital of the said company shall be taken and considered as the security required by law for the faithful performance of their duties as aforesaid and shall be absolutely liable in case of any default whatever.

Clause III. That any executor, administrator, guardian, or trustee, having the custody or control of any bonds, stocks or other valuables belonging to others, shall be authorized to deposit the same for safe keeping with said companies.

Clause IV. That whenever any court shall appoint said companies assignees, receiver, guardian, executor, administrator, or to execute any trust whatever, the said court may in its discretion or upon the application of any person interested, appoint a suitable person to investigate the affairs and management of the company so appointed, who shall report to such court the manner in which its investments are made and the security afforded to those by or for whom its engagement are held, and the expense of such investigation shall be defrayed by said company; or the court may if deemed necessary examine the officers of said company under oath or affirmation as to the security aforesaid.

Clause V. The said companies shall keep all trust funds and investments separate and apart from the assets of the companies, and all investments made by the said companies as fiduciaries shall be so designated as that the trust to which such investment shall belong shall be clearly known"

Acts of 1895, P. L. 127, No. 96.

An Act To amend the fourth section of an act entitled "An act supplementary to an act, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved the twenty-ninth day of April, Anno Domini, one thousand eight hun-
10 dred and seventy-four, amending the twenty-ninth section of said act, so as to provide for the further regulation of

and granting additional powers to all corporation, now or hereafter incorporated under the provisions of said act for the insurance of owners of real estate, mortgages, and others interested in real estate from loss by reason of defective titles, liens and encumbrances,' enlarging the powers of such corporations and providing that courts into which moneys may be paid or brought may, by order, direct the same to be deposited with any such corporation.

Section 1. Be it enacted &c., That the fourth section of an act, entitled "An Act supplementary to the act entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved the twenty-ninth day of April, Anno Domini, one thousand eight hundred and seventy-four, amending the twenty-ninth section of said act, so as to provide for the further regulation of and granting additional powers to all corporations now or hereafter incorporated under the provisions of said act for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens, and, liens, and encumbrances,' approved the ninth day of May, Anno Domini one thousand eight hundred and eight-nine, which reads as follows:

'Fourth. To act as assignees, receivers, guardians, executors, administrators, and to execute trusts of every description not inconsistent with the laws of this State or of the United States,' be and is hereby amended so as to read as follows:

Fourth. To act as assignees, receivers, guardians, executors, administrators, and to take, accept, and execute trusts of every description not inconsistent with the laws of this State or of the United States, and to receive deposits of moneys and other personal property and issue their obligations therefor, to invest their funds in and to purchase real and personal securities, and to loan money on real and personal securities.

Section 2. That every court into which moneys may be paid by parties or be brought by order or judgment may, by order, direct the same to be deposited with any such corporation."

11 II.

Said claimant, as aforesaid, created and organized for the purpose of insuring titles to real estate; receiving and holding on deposit and in trust and as securities, real and personal property; insuring the fidelity of persons holding places of responsibility and trust; receiving upon deposit for safe keeping valuable property of every description; acting as assignees, receivers, guardian, executor, administrator, and surety; executing trusts of every description; and in general for the purposes provided by the aforesaid act of the Commonwealth of Pennsylvania and the supplements thereto which was the character of the business carried on by the claimant, as shown by a certified copy of its charter herewith filed, marked claimant's Exhibit "A," and prayed to be read and considered a part of this petition, it having complied fully with the requirements of the

above mentioned statutes of the Commonwealth of Pennsylvania, covering the period from July 1, 1898, to June 30, 1902, it being expressly provided by the Act of the Assembly of the Commonwealth of Pennsylvania, approved May 9, 1889, "that nothing herein contained shall authorize said companies to engage in the business of banking."

That your petitioner is advised after diligent search up to and including the year 1902, that no statutes of the Commonwealth of Pennsylvania relating to the subject of banking or trust companies so far as they relate to a definition of either can be found.

III.

On or about the 13th day of June, 1898, the President of the United States approved an Act entitled "An Act to provide ways and means to meet War expenditures and for other purposes" (30 Stat., 448), Section 2 of said Act reading as follows:

12 "That from and after July 1, 1898, a special tax shall be, and hereby is imposed annually as follows, that is to say:

"Bankers using or employing a capital not exceeding the sum of ($25,000), shall pay fifty dollars ($50); when using or employing a capital exceeding twenty-five thousand dollars ($25,000), for every additional thousand dollars in excess of twenty-five thousand dollars ($25,000), two dollars ($2), and in estimating capital, surplus shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital and surplus for the preceding fiscal year.

"Every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be a banker under this Act; Provided, That any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning or investing the same for the benefit of its depositors, and which does no other business of banking, shall not be subject to this tax."

These provisions are amended by 31 Stat., 938, in respects not material to the present case.

IV.

By the Act of April 12, 1902 (32 Stat., 96, 97), Section 2 of the Act of June 13, 1898, above referred to, together with all amendments thereto, was repealed to take effect July 1, 1902.

V.

On July 27, 1912, the President approved another Act entitled "An Act extending the time for the repayment of certain war
13 revenue taxes erroneously collected (37 Stat., 240). Said Act reads as follows:

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of Section twenty-nine of the Act of Congress approved June 13, 1898, known as the War-revenue tax, or of any sums alleged to have been excessive or in any manner wrongfully collected under the provisions of said Act may be presented to the Commissioner of Internal Revenue on or before the first day of January, 1914, and not thereafter.

"Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter present their claims and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the Act aforesaid."

VI.

That on or about the 27th day of July, 1898; the 20th day of July, 1899; the 26th day of July, 1900; the 17th day of July, 1901; and the 2nd day of January, 1902, the Collector of Internal Revenue for the 23rd Internal Revenue District of the State of Pennsylvania, as aforesaid, acting for and on behalf of the United States, and assuming to act as such and under Section 2 of the Act of Congress, approved June 13, 1898, demanded and collected from your claimant as a Special Bankers' Tax, sums aggregating the sum of Ten thousand and twenty-eight dollars and ninety-four cents ($10,028.94), the tax aforesaid being assessed as a Special Bankers' Tax on the capital and undivided profits of this claimant, viz:

14 Capital arbitrarily assumed by the Collector of Internal Revenue to have been used or employed by the claimant in the business of a banker under Section 2 of the War Revenue Act of 1898, aforesaid:

For the fiscal year ending June 30, 1898, One million dollars ($1,000,000), at two dollars per thousand..	$2,000.00
For the fiscal year ending June 30, 1899, One million dollars ($1,000,000), at two dollars per thousand....	2,000.00
For the fiscal year ending June 30, 1900, One million dollars ($1,000,000), at two dollars per thousand....	2,000.00
For the fiscal year ending June 30, 1901, One million dollars ($1,000,000), at two dollars per thousand....	2,000.00

Undivided profits of the company upon which a tax was paid at two dollars per thousand, were as follows:

For the fiscal year ending June 30, 1898, Three hundred and sixty-five thousand four hundred sixty-eight and 54/100 dollars ($365,468.54)	730.94
For the fiscal year ending June 30, 1901, Six hundred forty-nine thousand dollars ($649,000)	1,298.00
Total	$10,028.94

That the terms and direction of the War Revenue Act of June 13, 1898, required the taxes to be payable for each year in advance and assessed upon amount of the previous year of the capital and surplus of the claimant, which method was followed by the aforesaid Collector of Internal Revenue in this case.

All of the above as shown by the records of the office of the Commissioner of Internal Revenue, Treasury Department, is hereby referred to and prayed to be considered a part of this petition.

15 VII.

That no part of the capital or undivided profits of this claimant was used or employed as a banker in the banking business within the meaning of Section 2 of the War Revenue Act of June 13, 1898, aforesaid. To the contrary, the entire capital and undivided profits of the claimant company were permanently invested in real estate, stocks, bonds, and other securities covering the entire taxing period from July 1, 1898, to June 30, 1892, and the use of the aforesaid capital and undivided profits of this claimant was confined entirely to its trust, safe deposit and Title Insurance Business aforesaid, covering the entire taxing period above stated.

VIII.

That on the 25th day of November, 1913, your claimant by its attorneys duly filed an application in the Treasury Department under the Refunding Act of Congress of July 27, 1912, aforesaid praying the refund of all of the said moneys, through the Collector of Internal Revenue for the 23rd Internal Revenue District for the State of Pennsylvania, as aforesaid (which was the procedure required by the Treasury Department), who, in the regular course of his official business, certified the same to the Treasury Department for its consideration, as shown by the records of the office of the Commissioner of Internal Revenue, Treasury Department, and prayed to be read and considered a part of this petition.

Said application was on Form 46 of the office of the Commissioner of Internal Revenue of the Treasury Department, as required, and was in all respects complete, regular, and in accordance with the laws and regulations, and was accompanied by all the necessary evidence and proof of facts, the same consisting of a Power of Attorney of the claimant to Lyon & Lyon, as Attorneys, to make

16 such claim; five receipts of the Collector of Internal Revenue of the 23rd District of Pennsylvania, on form 1, showing payment of the taxes; and the affidavit of the claimant showing that the

capital and undivided profits *was* permanently invested in real estate, stocks, bonds, and other securities, and any banking business carried on was entirely by means of the depositors' moneys and that the capital and undivided profits were not used or employed in the banking business; these being the reasons set forth by the claimant in the claim for refund to show the tax was erroneous and illegal and refundable to it under the act of July 27, 1912, aforesaid. The facts alleged in the said application were not traversed or denied by the Secretary of the Treasury, or by any representative of the United States. Although said application was in all respects complete and in due form, nevertheless, on or about April, 1917, the Secretary of the Treasury rejected and denied the said application and has continuously declined, and still declines, and refuses to pay your claimant the moneys asked for and demanded in its application as aforesaid as shown by the records of the Treasury Department hereby referred to and prayed to be considered a part of this petition.

IX.

Your petitioner is advised by its counsel, and therefore avers that the taxes collected from it are illegal and erroneous for the following reasons, to-wit:

a. Because the entire amount of said claimant's capital and undivided profits were at the time said assessments were levied and during the taxing period from July 1, 1898, to June 30, 1902, permanently invested in stocks, bonds, securities and other property, and were not at any time from July 1, 1898, to June 30, 1902,
17 nor any part thereof, used in the banking business or advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes.

b. Because the entire capital and undivided profits of the claimant during the entire period of taxation aforesaid were confined to, and used and employed exclusively by, the claimant in its trust, safe deposit and Title Insurance business and not as a banker or in the banking business within the meaning of Section 2 of the War Revenue Act.

c. Because the petitioner was not at the time said assessments were levied and payment of taxes made or at any time during the taxing period from July 1, 1898, to June 30, 1902, a banker or engaged in the banking business.

d. That Section 2 of the War Revenue Act of June 13, 1898, aforesaid, contained no authority for the assessment and collection of this tax on "undivided profits" but such "Special Bankers' Tax" was confined entirely to the tax on capital and surplus used and employed as a banker or in the banking business.

That the moneys which were collected from your claimant as taxes on capital and undivided profits used or employed in the banking business aforesaid, are refundable to it, under the terms and provisions of the Refunding Act of Congress approved July 27,

1912, as hereinbefore set forth, and that the refusal of the Secretary of the Treasury to refund such moneys is directly in violation of said Act.

X.

No action upon this claim other than herein set forth has been taken before Congress or any other of the Departments of the Government.

XI.

The claimant avers that there is justly due and owing to it on account of matters hereinbefore set forth the sum of Ten
18 thousand and twenty-eight dollars and ninety-four cents ($10,028.94), after deducting all just set-offs and demands on the part of the United States, and that it is the sole owner of the claim herein sued upon and that no assignment or transfer of the claim or any part thereof or any interest in the same has been made, and that it is a citizen of the United States, and loyal to the United States Government and has not at any time aided or abetted in any manner or given comfort to any sovereign or government that is or ever has been at war with the United States Government.

Wherefore, the claimant prays judgment against the United States for the sum of Ten thousand twenty-eight dollars and ninety-four cents ($10,028.94).

FIDELITY TITLE AND TRUST COMPANY,
PITTSBURGH, PENNSYLVANIA,
By LYON & LYON,
Attorney- for the Claimant.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Personally appeared before me, a Notary Public, in and for the District of Columbia, R. B. H. Lyon, who, being duly sworn according to law, deposes and says that he is a member of the firm of Lyon & Lyon, and that he is duly authorized to make oath in this cause by virtue of power of attorney heretofore filed, and he has read and understands the foregoing petition, and that the facts herein set forth are true in substance and fact as he is informed and believes.

R. B. H. LYON.

Subscribed and sworn to before me, a Notary Public, this 20th day of February, A. D. 1919.

GEORGE W. SMITH,
Notary Public.

19 CLAIMANT'S EXHIBIT "A."

FIDELITY TITLE AND TRUST COMPANY.

To His Excellency
Robert E. Pattison,
Governor of Pennsylvania.

SIR:

In compliance with the requirements of an Act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An Act to provide for the incorporation and regulation of certain corporations" approved the twenty-ninth day of April, A. D. 1874, and the various supplements, thereto, the undersigned, all of whom are citizens of Pennsylvania, having associated themselves together for the purposes hereinafter specially set forth and desiring that they may be incorporated and that Letters Patent may issue to them and their successors according to law, do hereby certify.

1st. The name of the proposed corporation is "Fidelity Title and Trust Company."

2d. Said corporation is formed for the purposes of engaging in and carrying on the business of the insurance of owners of real estate, mortgages and others interested in real estate from loss by defective titles, liens and encumbrances; for receiving and holding on deposit and in trust and as security, estates, real and personal including the notes, bonds, obligations of States, individuals, companies and corporations; and the same to purchase, collect, adjust and settle, sell and dispose of in any manner without proceeding in law or equity and for such price and on such terms as may be agreed on between them and the parties contracting with them; of making insurance for the fidelity of persons holding places of responsibility and trust; for receiving upon deposit for safe keeping, jewelry,
20 plate, stocks, bonds and valuable property of every description as may be agreed upon; of acting as assignees, receivers, guardians, executors, administrators and of executing trusts of every description not inconsistent with the laws of Penna., or of the United States of America; of acting as agents for issuing or countersigning the certificates of stock, bonds or other obligations of any corporation, association, municipality, State or public authority and of receiving and managing any sinking fund thereof on such terms as may be agreed upon; of becoming sole surety in any case whereby law one or more sureties may be required for the faithful performance of any trust or office and of taking property as may have been the subject of any insurance made by such proposed corporation under the powers conferred by its charter and of granting, bargaining, selling, conveying and disposing of the same in such manner as such proposed corporation may see proper.

3d. The business of said corporation is to be transacted in the City of Pittsburgh, in the County of Allegheny, in the State of Pennsylvania.

4th. Said corporation is to exist perpetually.

5th. The names and residences of the subscribers and the number of shares subscribed by each, are as follows:

Name.	Residence.	No. of shares.
J. Baird Henry	Philadelphia, Pa.	One hundred (100)
C. W. Henry	Philadelphia, Pa.	One hundred (100)
J. L. Erringer	Philadelphia, Pa.	Fifty (50)
H. F. West	Philadelphia, Pa.	Twenty-five (25)
Jno. B. Gest	Philadelphia, Pa.	Twenty-five (25)
Jno. H. Watt	Philadelphia, Pa.	Ten (10)
Henry Wheeler, Jr.	Philadelphia, Pa.	Twenty-five (25)
J. Levering Jones	Philadelphia, Pa.	Fifty (50)
Hampton S. Carson	Philadelphia, Pa.	Twenty-five (25)
W. B. Redding	Philadelphia, Pa.	Twenty-five (25)
Chas. J. Carpenter	Philadelphia, Pa.	Forty (40)

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D. J. H. White	Philadelphia, Pa.	Fifty (50)
W. H. Staake	Philadelphia, Pa.	Fifty (50)
Gugn T. Jones	Philadelphia, Pa.	Fifty (50)
Wm. Super	Philadelphia, Pa.	Twenty-five (25)
Jno H. Graham	Philadelphia, Pa.	Twenty-five (25)
J. M. Kennedy, Jr.	Philadelphia, Pa.	Twenty-five (25)
John W. Graham	Philadelphia, Pa.	Ten (10)
Geo. W. Allen	Philadelphia, Pa.	Twenty-five (25)
Wm. H. Allen	Philadelphia, Pa.	Twenty-five (25)
W. C. Stevenson	Philadelphia, Pa.	Twenty-five (25)
Dallas Sanders	Philadelphia, Pa.	Fifty (50)
S. G. Hubern	Philadelphia, Pa.	Fifty (50)
Jas. H. Lvons	Philadelphia, Pa.	Fifty (50)
S. Wm. Mitchell	Philadelphia, Pa.	Twenty-five (25)
Harry C. Gibson	Philadelphia, Pa.	Fifty (50)
Geo. B. Bonnell	Philadelphia, Pa.	Twenty-five (25)
Frank R. Prichard	Philadelphia, Pa.	Twenty-five (25)
Beauneau Borie	Philadelphia, Pa.	Fifty (50)
Jno. C. Fair	Philadelphia, Pa.	Fifty (50)
Wm. M. Fair	Philadelphia, Pa.	Fifty (50)
Robt. W. Fitzell	Philadelphia, Pa.	Fifty (50)
Jos. Fitzell	Philadelphia, Pa.	Five (5)
Seth Caldwell, Jr.	Philadelphia, Pa.	Twenty-five (25)
Alex. Pennes	Philadelphia, Pa.	Twenty (20)
Frank M. Riter	Philadelphia, Pa.	Ten (10)
Sam'l Rea	Philadelphia, Pa.	Fifty (50)
Sam'l Land	Philadelphia, Pa.	Ten (10)
W. Gulard	Philadelphia, Pa.	Ten (10)
Geo. W. Brenner	Philadelphia, Pa.	One hundred (100)
Jos. A. Brenner	Philadelphia, Pa.	Fifty (50)
L. T. Jones	Philadelphia, Pa.	Fifty (50)
Isabel Simpson	Philadelphia, Pa.	Ten (10)

Name.	Residence.	No. of shares.	
Lena Teal	Philadelphia, Pa.	Five	(5)
Chas. E. West	Philadelphia, Pa.	Four	(4)
M. S. Quay	Harrisburg, Pa.	One hundred	(100)
T. B. Rea	Pittsburgh, Pa.	Forty	(40)
J. W. Benham	Pittsburgh, Pa.	Fifty	(50)
J. F. Robinson	Pittsburgh, Pa.	Fifty	(50)
S. M. Robinson	Pittsburgh, Pa.	Twenty-five	(25)

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T. C. Lazear	Pittsburgh, Pa.	Ten	(10)
I. G. MacFarland	Pittsburgh, Pa.	Ten	(10)
Chas. Donnelly	Pittsburgh, Pa.	Fifty	(50)
Chas. L. Cole	Pittsburgh, Pa.	Twenty-five	(25)
Chas. L. Taylor	Pittsburgh, Pa.	Thirty	(30)
W. A. Herron	Pittsburgh, Pa.	Ten	(10)
Lendenthal	Pittsburgh, Pa.	Twenty	(20)
G. P. Hamilton, Jr.	Pittsburgh, Pa.	Twenty	(20)
C. B. Shea	Pittsburgh, Pa.	Twenty-five	(25)
Geo. Shiras, Jr.	Pittsburgh, Pa.	One hundred	(100)
Jas. S. McCord	Pittsburgh, Pa.	One hundred	(100)
Jacob Painter, Jr.	Pittsburgh, Pa.	Fifty	(50)
D. Robinson	Pittsburgh, Pa.	Fifty	(50)
W. A. Robinson	Pittsburgh, Pa.	Fifty	(50)
Reuben Miller	Pittsburgh, Pa.	One hundred	(100)
J. J. Donnell	Pittsburgh, Pa.	One hundred	(100)
Jno. A. Wilson	Pittsburgh, Pa.	Twenty	(20)
G. W. Guthrie	Pittsburgh, Pa.	One hundred	(100)
A. H. Childs	Pittsburgh, Pa.	One hundred	(100)
Chas. E. Speer	Pittsburgh, Pa.	One hundred	(100)
Jno. H. Rickertson	Pittsburgh, Pa.	Fifty	(50)
W. L. Jones	Pittsburgh, Pa.	Fifty	(50)
R. C. Gray	Pittsburgh, Pa.	Fifty	(50)
C. B. Herron	Pittsburgh, Pa.	Fifty	(50)
J. W. Chalfant	Pittsburgh, Pa.	Fifty	(50)
Robert Pitcairn	Pittsburgh, Pa.	One hundred	(100)
G. T. Watson	Pittsburgh, Pa.	One hundred	(100)
C. A. Painter	Pittsburgh, Pa.	Twenty-five	(25)
G. E. Painter	Pittsburgh, Pa.	Twenty-five	(25)
W. R. Blair	Pittsburgh, Pa.	Twenty-five	(25)
H. C. Frick	Pittsburgh, Pa.	Fifty	(50)
E. M. Ferguson	Pittsburgh, Pa.	Fifty	(50)
A. W. Mellon	Pittsburgh, Pa.	Fifty	(50)
J. B. Speer	Pittsburgh, Pa.	Fifty	(50)
E. M. O'Neill	Pittsburgh, Pa.	Fifty	(50)
O. H. Allerton, Jr.	Pittsburgh, Pa.	Fifty	(50)
J. F. Slagle	Pittsburgh, Pa.	Fifty	(50)
E. House	Pittsburgh, Pa.	Twenty-five	(25)
F. Semple	Pittsburgh, Pa.	Fifty	(50)

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Name.	Residence.	No. of shares.
Sam'l Dickson	Pittsburgh, Pa.	Fifty (50)
L. W. Dalzell & Co.	Pittsburgh, Pa.	Fifty (50)
Wm. Scott	Pittsburgh, Pa.	Twenty-five (25)
C. L. McGee	Pittsburgh, Pa.	One hundred (100)
H. S. A. Stewart	Pittsburgh, Pa.	Fifty (50)
W. McCandless	Pittsburgh, Pa.	Fifty (50)
C. J. Clarke	Pittsburgh, Pa.	Fifty (50)
M. K. Moorhead	Pittsburgh, Pa.	Fifty (50)
Wm. Carr	Pittsburgh, Pa.	Fifty (50)
J. H. White	Pittsburgh, Pa.	Twenty-five (25)
J. T. Armstrong	Pittsburgh, Pa.	Fifty (50)
Jno. H. Hampton	Pittsburgh, Pa.	Fifty (50)
A. E. W. Painter	Pittsburgh, Pa.	Fifty (50)
Jno. Pitcairn, Jr.	Pittsburgh, Pa.	Thirty (30)
Wm. Lyon	Pittsburgh, Pa.	Fifty (50)
J. R. McCune	Pittsburgh, Pa.	Fifty (50)
H. H. King	Pittsburgh, Pa.	Fifty (50)
I. W. Paul	Pittsburgh, Pa.	Fifty (50)
R. D. Book	Pittsburgh, Pa.	Ten (10)
B. S. Crumpton	Pittsburgh, Pa.	Ten (10)
J. G. Holmes	Pittsburgh, Pa.	Fifty (50)
J. L. Dawson Speer	Pittsburgh, Pa.	Ten (10)
Pbg. Bk for Savings	Pittsburgh, Pa.	Ten (10)
Chas. E. Speer, Jr.	Pittsburgh, Pa.	One hundred and thirty-six (136)

6th. The number of directors of said corporation is fixed at fifteen and the names and residences of the directors who are chosen directors for the first year are as follows:

24 Name.	Residence.
Geo. Shiras, Jr.	Pittsburgh, Pa.
Jno. R. McCune	Pittsburgh, Pa.
Robert Pitcairn	Pittsburgh, Pa.
Reuben Miller	Pittsburgh, Pa.
Chas. E. Speer	Pittsburgh, Pa.
James J. Donnell	Pittsburgh, Pa.
Albert H. Childs	Pittsburgh, Pa.
H. S. Stewart	Pittsburgh, Pa.
E. M. O'Neill	Pittsburgh, Pa.
E. M. Ferguson	Pittsburgh, Pa.
David Robinson	Pittsburgh, Pa.
William Scott	Pittsburgh, Pa.
William H. Staake	Philadelphia, Pa.
J. Levering Jones	Philadelphia, Pa.
J. Baird Henry	Philadelphia, Pa.

7th. The amount of the capital stock of said corporation is Five Hundred Thousand ($500,000) dollars, divided into 5,000 shares of the par value of $100 each. And $50,000, being ten per centum of the capital stock, has been paid in cash to the Treasurer of said corporation whose name and residence is, B. S. Crumpton, Pittsburgh, Pa.

Respectfully submitted,

GEORGE SHIRAS, JR. [SEAL.]
REUBEN MILLER. [SEAL.]
JAMES J. DONNELL. [SEAL.]
ROBT. PITCAIRN. [SEAL.]
H. S. A. STEWART. [SEAL.]
E. M. FERGUSON. [SEAL.]
WILLIAM SCOTT. [SEAL.]
J. LEVERING JONES. [SEAL.]
M. K. MOORHEAD. [SEAL.]
THOS. B. REA. [SEAL.]
B. S. CRUMPTON. [SEAL.]
J. R. McCUNE. [SEAL.]
CHAS. E. STEER. [SEAL.]
A. H. CHILDS. [SEAL.]
JNO. A. WILSON. [SEAL.]
E. M. O'NEILL. [SEAL.]
Pittsburgh, Pa.
DAVID ROBINSON. [SEAL.]
WILLIAM E. STAAKE. [SEAL.]
JNO. W. CHALFANT. [SEAL.]
WILLIAM CARR. [SEAL.]
A. W. MELLON. [SEAL.]

25 STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Before me, the Recorder of Deeds in and for the County aforesaid personally came the above named, Charles E. Speer, B. S. Crumpton and Jno. A. Wilson, who in due form of law acknowledged the foregoing instrument to *the* their act and deed for the purposes therein specified.

Witness my hand and seal the twenty-ninth day of October, A. D. 1886.

[SEAL.] WM. H. GRAHAM,
Recorder.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Personally appeared before me this 29th day of October, A. D. 1886, Charles E. Speer, B. S. Crumpton and Jno. A. Wilson, who being duly sworn, according to law, depose and say that the statements contained in the foregoing instruments are true.

CHAS. E. SPEER.
B. S. CRUMPTON.
JNO. A. WILSON.

Sworn and subscribed before me this 29th day of October, A. D. 1886.

[SEAL.] WM. H. GRAHAM,
Recorder.

Executive Chamber.

Harrisburg, Nov. 27th, 1886.

Hon. William S. Stenger,
Secretary of the Commonwealth:

Having examined the within application and found it to be in proper form and within the purposes of the class of corporations specified in Section Two of the Act entitled "An Act to provide for the incorporation and regulation of certain corporations" ap-
26 proved April 29th, A. D. 1874, and the various supplements, thereto I, hereby aprove the same and direct that Letters Patent issue according to law.

ROBT. E. PATTISON,
Governor.

PENNSYLVANIA, *ss:*

Secretary's Office.

Enrolled in Charter Book No. 19, page 489, &c.
Witness my hand and seal of office at Harrisburg this 27th day of November, A. D. 1886.

[SEAL.] WM. S. STENGER,
Secretary of the Commonwealth.

PENNSYLVANIA, *ss:*

Robt. E. Pattison.

In the Name and by the Authority of the Commonwealth of Pennsylvania.

[SEAL.]

Robt. E. Pattison, Governor of the said Commonwealth, to all to whom these presents shall come sends greeting:

Whereas, In and by an Act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An Act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, Anno Domini One thousand eight hundred and seventy-four, and the supplements thereto, the Governor of this Comomnwealth is authorized and required to issue Letters Patent to all corporations formed under the provisions of said Acts, embraced within the second class named therein.

And Whereas, The stipulations, conditions and things directed to be performed in said recited Act of the General Assembly, and
27 supplements, have been fully complied with by Fidelity Title and Trust Company, formed under the provisions of said

recited Acts. The business of said corporation is to be transacted in the City of Pittsburgh, County of Allegheny, State of Pennsylvania.

Now know ye, That in pursuance of the power and authority to me given by law, I, Robert E. Pattison, Governor of the said Commonwealth, do by these presents, which I have caused to be made patent and sealed with the Great Seal of the State, create and erect the subscribers to the stock of the said corporation, and for the number of shares by them subscribed, to wit:

George Shiras, Jr	100
J. R. McCune	50
Reuben Miller	100
Chas. E. Speer	100
James J. Donnell	100
A. H. Childs	100

and others,

and also those who may hereafter become subscribers or holders of the stock of said corporation, into one body politic and corporate, in deed and in law, by the name, style and title of Fidelity Title and Trust Company and by the said name, the said subscribers shall have perpetual succession and all the privileges and franchises incident to a corporation. And the said subscribers, and those who shall afterwards subscribe to the stock of the said corporation, their successors and assigns, are generally to be invested with all the rights, powers and privileges, with full force and effect, and subject to all the duties, requisites and restrictions, specified and enjoined in and by the said Act of the General Assembly and all other laws of this Commonwealth.

Given under my Hand and the Great Seal of the State, at
28 Harrisburg, this Twenty-seventh day of November, in the year of our Lord one thousand eight hundred and eighty-six, and of the Comomnwealth the one hundred and eleventh.

By the Governor.

WM. S. STENGER,
Secretary of the Commonwealth.

Office of the Secretary of the Commonwealth of Pennsylvania.

Harrisburg, January 27, 1919.

PENNSYLVANIA, *ss:*

I do hereby certify, That the foregoing and annexed is a full, true and correct copy of the Articles of Association and Letters Patent of the Fidelity Title and Trust Company, as the same appear of record in this office.

In testimony whereof, I have hereunto set my hand and caused the seal of the Secretary's Office to be affixed, the day and year above written.

[SEAL.]

GEO. D. THORN,
Acting Deputy Secretary of the Commonwealth.

29 II. *General Traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, to the amended petition, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On May 4, 1920, this case was argued and submitted on merits by Messrs. Seth Shepard and R. B. H. Lyon, for claimant, and by Mr. Assistant Attorney General Frank Davis, Jr., and Mr. Charles H. Bradley, for defendant.

30 IV. *Findings of Fact and Conclusion of Law.*

Filed June 7, 1920.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The Fidelity Title & Trust Company is a corporation duly created and existing under the laws of the Commonwealth of Pennsylvania, having been incorporated on November 27, 1886, under the general Act of April 20, 1874, as later variously amended. True copies of said laws, amendments and the charter of the company are incorporated in plaintiff's petition, a copy of which is attached to and made a part of these findings.

II.

On January 27, 1898, July 20, 1899, July 26, 1900, July 17, 1901, and January 2, 1902, defendant's appropriate revenue officers demanded and collected from plaintiff as special banker's taxes under Section 2 of the Act of June 13, 1898, sums aggregating $10,028.94, as follows:

Capital held by the Collector of Internal Revenue to have been used or employed by the plaintiff in the business of a banker under Section 2 of the War Revenue Act of 1898, aforesaid:

31

For the fiscal year ending June 30, 1898, one million dollars (1,000,000), at two dollars per thousand....	$2,000.00
For the fiscal year ending June 30, 1899, one million dollars ($1,000,000), at two dollars per thousand....	$2,000.00
For the fiscal year ending June 30, 1900, one million dollars ($1,000,000), at two dollars per thousand....	$2,000.00

For the fiscal year ending June 30, 1901, one million dollars ($1,000,000), at two dollars per thousand..	$2,000.00

Undivided profits of the company upon which a tax was paid at two dollars per thousand, were as follows:

For the fiscal year ending June 30, 1898, three hundred and sixty-five thousand four hundred and sixty-eight and 54/100 dollars ($365,468.54)	730.94
For the fiscal year ending June 30, 1901, six hundred forty-nine thousand dollars ($649,000)	1,298.00
Total	$10,028.94

These sums were duly paid and regularly reported by said revenue officers to the Treasury Department and covered into the Treasury of the United States.

III.

On the 25th day of November, 1913, plaintiff duly filed an application in the Treasury Department under the Refunding Act of July 27, 1912, praying the refund of all of said moneys, through the Collector of Internal Revenue for the 23rd Internal Revenue District for the State of Pennsylvania (which was the procedure required by the Treasury Department), who, in the regular course of his official business, certified the same to the Treasury Department for its consideration. Said application for refund was rejected by the Secretary of the Treasury on May 8, 1917, and none of the taxes paid as aforesaid have ever been refunded to plaintiff.

IV.

The Fidelity Title & Trust Company is, as its name indicates, a title guaranty and trust company. During the period in question plaintiff's sole place of business was in the City of Pittsburgh, Pa., where it was engaged in the banking business. Credits were
32 opened with it by the deposit of money or currency, subject to be paid or remitted upon draft, check or order, and money was advanced or loaned on stocks and bonds.

V.

Plaintiff does and did during the period in question a large amount of business other than that enumerated above; it insured the owners of real estate, mortgages and others interested in real estate, from loss by reason of defective titles, liens and encumbrances; it accepted and executed trusts; it insured the fidelity of persons in places of trust and responsibility; it purchased and sold real estate and acted as legal depositary for moneys paid into court by executors, trustees, receivers and other fiduciaries.

VI.

Plaintiff's capital stock outstanding at all times during this period was $1,000,000. Plaintiff carried on its books an account known as "Profits and Loss Account," the credit balance in which increased from nothing during the first two years of the company's existence to $414,468.88 on June 30, 1898, $485,888.76 on June 30, 1899, $617,771.92 on June 30, 1900, $762,144.28 on June 30, 1901 and $948,074.56 on June 30, 1902. This credit balance represented the accumulated profits of the company from the time it began business until June 30, 1902.

The undivided profits were subject at all times to distribution as dividends among the stockholders of the company by the board of directors.

These undivided profits were not in any way set apart as separate or different from any other undivided profits of the company. All of the company's undivided profits were carried into the Profit and Loss Account as such and comprised the credit items on that account, viz; Safety vault rents, building rents, title fees, interest on loans and investments, earnings of trust department, trustee commissions. To this account were debited the dividends earned and paid, the expenses of operating the entire business of the company, as well as all losses incurred.

The said profit and loss credit balance was never designated as or set apart or appropriated to capital or surplus or used for capital or surplus purposes. A surplus fund was created in 1903 through an increase and sale of capital stock at $400 per share, $100 a share being credited to capital account and $300 to surplus account. In this way a surplus of $3,000,000 was created and constantly maintained at that figure ever since.

All the earnings from the various branches of the plaintiff's business were pooled and went into the profit and loss account. No attempt was made to segregate the investments made or to earmark them as having been made with the earnings from any particular branch of its business. There was no segregation of the moneys received from the capital stock or the investments made therewith from the moneys derived from its earnings or the investments made therewith.

VII.

The assets of plaintiff company during the period involved (average from its yearly statements) were as follows:

Building, Real Estate & Vault	$437,000.00
Title Record Plant	112,400.00
Cash, cash items and due from banks	1,397,867.00
Demand Loans	582,455.00
Mortgage Loans	298,530.00
Time Loans	551,204.00
Bonds and Premiums	966,049.00
	$4,355,505.00

The loans which the company made on stock and bonds are included in the items "Demand Loans" and "Time Loans".

The Trust assets of plaintiff during this period, which were separately invested in mortgages, stocks, bonds, real estate, etc., averaged $19,715,331.00.

34 The income or profit from the trust business was carried to the profit and loss account. The proportion of capital and accumulated profits used in the trust, vault and banking departments is not established by the evidence.

The average amount of deposits carried for customers during this period and subject to repayment upon check, draft or orders was $4,113,231.00.

The moneys received on deposit were used by the plaintiff in its business. The moneys thus received were commingled with the other moneys of the plaintiff and all investments were made from the general funds of the company.

VIII.

Plaintiff always kept permanently invested in long time securities an amount in excess of the par value of its capital stock, and carried on the books of the company a schedule of these investments, designated "Schedule of Investments of the Capital Stock of One Million Dollars". These schedules show investments made only in bonds and real estate. However, no physical segregation of the general assets of the company was practiced.

Part of plaintiff's capital consisted of its office building which, together with its other capital, it used and employed in all its business, including its banking business.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and that its petition ought to be, and the same is, hereby dismissed, on the authority of The Union Trust Co. of Indianapolis, Ind., v. United States, 55 C. Cls., 424. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be entered by the chief clerk and collected by him in the manner prescribed by law.

35 ## V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Seventh day of June, A. D., 1920, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that the plaintiff herein is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be, and the same hereby is, dismissed on the authority of The Union Trust Co. of Indianapolis, Ind., v.. United

States, 55 C. Cls. R., 424; And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff herein the sum of Eighty-six Dollars and eleven cents ($86.11), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VI. *Proceedings After Entry of Judgment.*

On August 6, 1920, the claimant filed a motion for a new trial, which motion was overruled by the Court on December 13, 1920.

36 VII. *Claimant's Application for and Allowance of an Appeal.*

From the judgment rendered in the above cause on the 13th day of December, 1920 in favor of the defendant, the claimant, by its attorneys, on the 3rd day of January, 1921 makes application for, and gives notice of, an appeal to the Supreme Court of the United States, the amount involved being the sum of $10,028.94.

LYON & LYON,
Attorneys for Claimant.

Filed January 3, 1921.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

January 3, 1921.

37 Court of Claims.

No. 33977.

FIDELITY TITLE & TRUST COMPANY, PITTSBURGH, PENNSYLVANIA,

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law entered by the court; of the judgment of the court; of the claimant's application for and allowance of an appeal to the Supreme Court of the United States.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Thirteenth day of January, A. D., 1921.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,056. Court of Claims. Term No. 699. Fidelity Title and Trust Company of Pittsburgh, Pennsylvania, appellant, vs. The United States. Filed January 24th, 1921. File No. 28,056.

Office Supreme Court, U. S.
FILED
MAR 16 1922
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 208.

FIDELITY TITLE AND TRUST COMPANY, PITTSBURGH, PA.,

vs.

UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

SIMON LYON,
R. B. H. LYON,
Attorneys for Appellant.

GEORGE SUTHERLAND,
Of Counsel.

Press of Byron S. Adams, Washington, D. C.

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IN THE

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OCTOBER TERM, 1921.

No. 208.

FIDELITY TITLE AND TRUST COMPANY, PITTSBURGH, PA.,
Appellant,

vs.

UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

The appellant is a corporation organized on November 27, 1886, under the laws of the Commonwealth of Pennsylvania. During the period involved in this controversy, it carried on in its own office building in Pittsburgh the following businesses (Finding I, Record 21):

1st. It insured owners of real estate mortgages and others interested in real estate from loss by reason of defective titles, liens and encumbrances.

2nd. It accepted and executed trusts.

3rd. It insured persons in places of trust and responsibility.

4th. It purchased and sold real estate.

5th. It acted as a legal depository for money paid into court by fiduciaries. (Finding V, Record 22.)

6th. It conducted a banking business by opening credits subject to be paid or remitted upon draft, check or order, and loaned money on stocks and bonds. (Finding IV, Record 22.)

During the years in question the capital of the corporation was $1,000,000. During the same period the undivided profits of the company were as follows:

Year ending June 30, 1898	$414,468.88
Year ending June 30, 1899	485,888.76
Year ending June 30, 1900	617,771.92
Year ending June 30, 1901	762,144.28

(Finding VI, Record 23.)

There was no surplus fund during any of the years enumerated. During each of these years, the corporation was required to pay and did pay to the authorized revenue officers as special banker's tax under Section 2 of the Act of June 13, 1898, the following sums:

Tax on Capital.

Year ending June 30, 1898, upon $1,000,000 at $2 per thousand	$2,000.00
Year ending June 30, 1899, upon $1,000,000 at $2 per thousand	$2,000.00
Year ending June 30, 1900, upon $1,000,000 at $2 per thousand	$2,000.00
Year ending June 30, 1901, upon $1,000,000 at $2 per thousand	$2,000.00

Tax on Undivided Profits.

Year ending June 30, 1898, upon $365,468.54 at $2 per thousand	$730.94
Year ending June 30, 1901, upon $649,000.00 at $2 per thousand	$1,298.00
Total	$10,028.94

These sums were covered into the Treasury of the United States. (Finding II, pp. 22-23.) The act of June 13, 1898, under which the officials of the Government assumed to assess and collect these taxes reads as follows:

> "That from and after July 1, 1898, a special tax shall be, and hereby is, imposed annually as follows, that is to say:
>
> "Bankers using or employing a capital not exceeding the sum of twenty-five thousand dollars ($25,000), shall pay fifty dollars ($50); when using or employing a capital exceeding twenty-five thousand dollars ($25,000), for every additional thousand dollars in excess of twenty-five thousand dollars ($25,000), two dollars ($2), and in estimating capital, surplus shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital and surplus for the preceding fiscal year.
>
> "Every person, firm and company and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon drafts, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or sale, shall be a banker under this act: Provided, That any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning or investing the same for the benefit of its depositors, and which does no other business of banking, shall not be subject to this tax." (30 Stat. 448.)

The appellant duly filed its application in the Treasury Department for a refund of the said sum of $10,028.94 under the Act of July 27, 1912, which reads as follows:

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of Section 29 of the Act of Congress approved June 13, 1898, known as the War Revenue Tax, or of any sums alleged to have been excessive or in any manner wrongfully collected under the provisions of said Act, may be presented to the Commissioner of Internal Revenue, on or before the first day of January, 1914, and not thereafter.

"Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated to such claimants as have presented or shall hereafter present their claims and shall establish such erroneous or illegal assessments and collection, any sums paid by them or on their account or in their interest, to the United States under provisions of the Act aforesaid." (37 Stat. 240.)

The application for refund prayed the return of all moneys through the Collector of Internal Revenue for the Twenty-third Revenue District for the State of Pennsylvania in accordance with the procedure required by the Treasury Department. The Collector in the regular course of his official business certified the same to the Treasury Department for its consideration. The application for refund was rejected by the Secretary of the Treasury on May 8, 1917, and none of the taxes paid as aforesaid have ever been refunded to the plaintiff. (Finding III, Record 22.)

THE ISSUES.

There are two issues in this case:

1. Whether appellant is entitled to recover the amount of taxes paid upon its capital for the years 1898 to 1901 inclusive.

2. Whether the appellant is entitled to recover the amount of taxes for the years 1898 and 1901 paid upon the undivided profits of the company.

FINDINGS OF FACT.

1.

Tax on Capital.

The findings upon which appellant seeks a reversal of the action of the Court of Claims for taxes collected upon the capital of the appellant alleged not to have been used in the business of banking, and hence not subject to the tax, are II, IV, V, VI, VII and VIII. (Record, pp. 20-24.)

From these findings it will be seen:

1. That during all the years in question the outstanding capital of the appellant company was $1,000,000 (Finding VI), and that taxes were demanded and collected each year for the same period on $1,000,000 capital (exclusive of undivided profits), held by the Collector to be used or employed in the business of banking. (Finding II, Record 21.)

2. The appellant is, as its name indicates, a title guaranty and trust company, and in addition to the title guaranty and trust business and banking business, it did a bonding or security business, dealt in real estate and acted as a legal depository for moneys paid into court by fiduciaries. (Findings IV and V, Record 22.)

3. Part of appellant's capital consisted of its office building, which, together with its other capital, it used and employed in all its business, including its banking business. (Finding VII, Record 24.) The proportion of its capital and accumulated profits used in the

trust, vault and banking department is not shown. (Finding VIII, Record 24.)

4. The appellant always kept permanently invested in long time securities an amount in excess of the par value of its capital stock, and carried on the books of the company a schedule of these investments, designated "Schedule of Investments of Capital Stock of One Million Dollars." These schedules show investment only in bonds and real estate. No physical segregation of the assets of the company was practiced. (Finding VIII, Record 24.)

2.

Tax on Undivided Profits.

The findings relating to undivided profits are II, VI and VII (Record, pp. 21-24).

1. The court below found that the appellant during the time in question carried in its "Profit and Loss Account" a credit balance on June 30 of each year as follows:

1898	$414,468.88
1899	485,888.76
1900	617,771.92
1901	762,144.78

(Finding VI, Record 23.)

and that appellees' revenue officers demanded and collected from appellant for the year ending June 30, 1898, $730.94 as a tax on $365,468.54 of undivided profits, and for the year ending June 30, 1901, $1,298.00 as a tax on $649,000 of undivided profits. (Finding II, Record 22.)

2. The aforesaid profit and loss credit balances or undivided profits were never designated as or set apart

or appropriated to capital or surplus, or *used for capital or surplus purposes.* (Finding VI, Record 23.)

ARGUMENT.

1. Tax on Capital.

Counsel for the appellant in the instant case are the same as for appellant in case No. 207, the Fidelity & Deposit Company of Maryland vs. United States, now pending in this court.

The brief in that case upon the question of the tax upon capital is relied upon in this case in seeking the reversal of the judgment of the Court of Claims and will not be here repeated.

2. Tax on Undivided Profits.

It does not appear why the revenue officers demanded and collected a tax upon the undivided profits for these two years, 1898 and 1901, and omitted to collect such taxes for the years 1899 and 1900, notwithstanding the record discloses that for these intermediate two years the appellant had a substantial amount of undivided profits. (Finding VI, Record, p. 23.)

The taxing act of 1898 (*supra*, p. 3), imposed a tax of $50 on bankers using or employing capital not exceeding the sum of $25,000, and for each $1,000 additional of capital, $2, and provided that "in estimating capital, surplus shall be included." Nothing is said about a tax on undivided profits, such as were taxed in this case.

The terms, "capital," "surplus" and "undivided profits," have a precise and definite meaning in the business of banking.

The distinction between surplus and undivided prof-

its is emphasized in the case of Sarles vs. Scandinavian American Bank, *et al.*, 156 N. W., 556; North Dakota. That case involved the construction of the State Statutes which prohibited the investment in bank building and equipment of over 30 per cent of a bank's capital stock and "unimpaired surplus." The bank proposed to so invest 30 per cent of its capital and its *undivided profits.* A stockholder sought to restrain the erection of the building upon the ground that the undivided profits were surplus within the meaning of the act and the amount of money proposed to be expended was more than 30 per cent of the capital and unimpaired surplus. The Court, affirming the lower court, refused the relief sought, and held:

> "It is also well to remember that there is a sharp distinction between undivided profits and surplus. Surplus, like the capital stock, constitutes the working capital of the bank, and it is in addition a fund for the protection of depositors. The undivided profits, on the contrary, is a temporary fund changing in size from day to day and carried only until dividend periods, when it is distributed to the stockholders or transferred to the permanent surplus. It is the funds from which the expenses and losses of the bank are paid."

The case of Bailey, Collector, vs. Clark, 21 Wallace 84, arose out of the Act of the 13th of July, 1864, 14th Stat. 136, which imposed a tax "upon the capital of any bank, association, company or corporation, and on the capital employed by any person in the business of banking, beyond the average amount invested in United States bonds." This court defined corporate capital therein as follows:

> "When used with respect to the property of a corporation or association the term (capital) has

a settled meaning. It applies *only to the property or means contributed by the stockholders as the fund or basis for the business enterprise for which the corporation or association was formed.*" (Italics ours.)

Surplus is an addition to the capital of the corporation in the form of a reserve against which losses may be charged without impairing its capital. "Surplus," as a matter of accounting, is carried as a capital asset.

"Undivided profits" may, as a matter of accounting, be carried under an account of that terminology, or it may be carried on the books as a credit balance in the "profit and loss" account, as was done in this case. It is not a capital account and "undivided profits" are not considered or treated as capital until they are by appropriate and proper resolution formally transferred to the "surplus" account.

It must be presumed that in the taxing act where "surplus" is used in connection with the tax on bankers it has the usual meaning given to that word by bankers, just as the court in Clark vs. Bailey (*supra*, p. 8) held that with reference to corporations the term capital had a settled meaning. Therefore, "surplus" as used in the act of 1898 (*supra*, p. 3), did not include funds carried under the "profit and loss" or "undivided profits" account of the banks.

The Commissioner of Internal Revenue apparently took this view of the meaning of the act, for in his report for the years 1899 and 1900, under the heading of "Amendments of the Law Recommended," subhead "Banks," he states:

> "In paragraph 1, section 2, Act June 13, 1898, relative to bankers, insert in the proper place the following:
>
> "Undivided profits shall be considered as surplus in estimating the tax due from banks by tak-

ing the average for the preceding year. * * *"
(Annual Reports of Commission of Internal Revenue, 1899, p. 91, 1900, p. 89.)

It is significant that the amendment suggested was not made, indicating the will of Congress that "undivided profits" should not be regarded as "surplus," and consequently should not be taxed.

The National Bank Act in force in 1898 to 1901 clearly distinguishes between capital, surplus and undivided profits. Section 5199 of the Revised Statutes (passed June 3, 1864, 12 Stat. 109), provides as follows:

> "The directors of any association may, semi-annually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half year to its surplus fund until the same shall amount to twenty per centum of its capital stock."

See also Sec. 5204, which provides:

> "No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts." * * *
>
> (Act June 3, 1864, c. 106, sec. 38; 13 Stat. L., 110.)

The above section clearly recognizes the distinction between "capital," "surplus" and "net profits" or "undivided profits."

The Attorney General, in two well-reasoned opinions construing the Act of 1898, held that "the undivided profits of a bank are not surplus and cannot be estimated under the law in question as a part of the bank surplus."

22nd Opinions of Attorney General, 320.

This decision was re-affirmed in 23 Op. Atty. Gen. 341, wherein it was held that "Congress, in taxing capital, meant to tax only the capital of the bank, in its strict technical sense under the banking laws, and that, in taxing surplus, it meant the fund set apart by the board of directors and surplus in its restricted and technical sense in banking. * * * It cannot be contended that, for purposes of banking, undivided profits constitute a part of the capital of a bank in the sense in which the word 'capital' is ordinarily and generally used." In the course of his opinion the Attorney General made the following observations, which are so persuasive that we set them out at length:

> "The national banking laws clearly distinguish between surplus and undivided profits. By section 5199 of the Revised Statutes, every national bank is prohibited from declaring 'any dividend until one-tenth part of the net profits of the preceding half year have been carried to the surplus fund, until a surplus of twenty per centum of the capital stock has been accumulated.' In determining whether the 20 per centum has thus been accumulated, it could not be pretended that the undivided profits were to be added to the fund formally known as surplus, and there is, therefore, a clear distinction between such fund and the undivided profits of a bank, for nine-tenths of the profits may be excluded from the fund called 'surplus.'

It is clear, moreover, from the section cited that, in addition to the capital, the bank must have the additional security of a surplus of at least 20 per centum of the capital stock before dividends are payable. This surplus fund, therefore, has the idea of permanence, and while not capital in its restricted sense, yet 'assumes the character of capital.' Undivided profits, however, have no necessary permanence; they come today and may be gone tomorrow. If the necessary surplus fund is in existence the undivided profits are immediately distributable among the stockholders in the form of dividends. It is thus apparent that the word surplus means a distinct and special fund, plainly recognized by statute, and which must exist independent of the fund called 'undivided profits' as a condition for the payment of dividends, and the Comptroller in requiring quarterly reports from national banking institutions requires this distinction to be observed. It is true that the present claimants are not national banking institutions and have no 'surplus' fund, but Congress did not mean that the expression surplus should mean one thing when applied to national banks and another when applied to State banking institutions or trust companies. The only question, therefore, is whether Congress, when it provided by section 2 of the revenue law of 1898 that bankers should pay a special tax, and when it provided that, 'in estimating capital, surplus shall be included,' meant surplus in the restricted and technical sense with which Congress had used it in the national banking laws and in which banking institutions of every kind use the term, or whether Congress had reference to every form of excess of receipts over disbursements, however evanescent and uncertain in character. The latter construction would cause much confusion and uncertainty in the effort of your Department to administer the law, and would often lead to inequality between banking institutions of the same class. Such construction should

be avoided. I am clear that Congress used the word surplus in its technical and restricted sense, of a fund formally set apart and called surplus by the authorized officers of the bank, and the previous opinion of this Department, of February 4, 1899, is to be so understood."

See also opinion Comptroller of the Treasury of April 27, 1899 (5th Comp. 731).

The appellee will no doubt cite the decision of the Circuit Court of Appeals for the second circuit in Leather Manufacturers' National Bank vs. Treat, 128 Fed. 262, as authority for imposing the tax. The facts in the present case are differentiated, however, from the facts in that case. There the court held in effect that as the undivided profits were held in the profit and loss account for a long period of years, it was to be presumed that they were used as capital (using the term in its broad sense) and became subject to the imposition of the tax as part of the capital. No such presumption can be indulged in this case since the court found specifically to the contrary, namely, that the undivided profits *were "never * * * used for capital or surplus purposes"* (our italics). (Finding VI, Record 23.) If not used for capital or surplus purposes, they were not capital or surplus used in the banking business, and, therefore, not subject to the imposition of the tax.

Aside from this, however, we submit that the opinion of the Attorney General just quoted presents the more logical view. The Court lays stress upon the fact that the statute applies to individual as well as corporate bankers, and adduces the conclusion that the words of the statute must apply to both alike. But this is by no means a necessary conclusion. Whether the same words in a statute relating to two different objects

shall be given precisely the same application depends upon circumstances. If the objects fall in different classes, the same words may be given a more extended scope as applied to one than as applied to the other.

In *Groves v. Slaughter,* 15 Peters 449, 505, this Court, recognizing that Congress, under the power to regulate foreign commerce, may pass "embargo and non-intercourse acts," says:

> "The power to regulate commerce among the several states is given in the same section and in the same language. But it does not follow that the power may be exercised to the same extent. * * *
>
> "The United States are considered as a unit in all regulations of foreign commerce, but this cannot be the case where the regulations are to operate among the several States. The law must be equal and general in its provisions. Congress cannot pass a non-intercourse law, as among the several States; nor impose an embargo that shall affect only a part of them."

See also the dissenting opinion of Chief Justice Fuller in the Lottery Cases, 188 U. S. 321, 373, where he pointed out that although the words of the Constitution giving Congress the power to regulate commerce with foreign nations and among the several States were the same words, they were nevertheless to be taken *diverso intuitu* and interpreted and applied according to the differing character of the objects to which they related. "Undivided profits" are words which have a technical meaning when applied to corporations. In the case of an individual, profits when allowed to accumulate may become part of his capital, but in the case of a corporation, as the Court itself says in the Treat case:

> "Undivided profits do not become a part of this fund (surplus) until they have been assigned to it by some formal act of the institution; and it is for the directors and not for the taxing officers of the Government to determine when this should be done."

There is, therefore, no inconsistency in saying that in the case of individuals, accumulated profits not actually withdrawn from the business may be regarded as capital, while in the case of a banking corporation, where the phrase "undivided profits" has a technical and restricted meaning, such profits are not to be regarded as surplus or capital until this formal action of the directors has been taken. In this connection, the rule with regard to the construction of taxing statutes is peculiarly applicable, namely, that their provisions are not to be extended by implication beyond the import of the language used or so as to enlarge their operation or to embrace matters not specifically pointed out. Such statutes in case of doubt are to be construed most strongly against the Government and in favor of the citizen.

Gould vs. Gould, 245 U. S. 151.

U. S. vs. Field, 255 U. S. 257.

U. S. vs. Woodward, 256 U. S.

Schimenka, Collector, vs. First Trust and Savings Bank, No. 540, Oct. Term, 1921, decided Feb. 27, 1922.

Appellant's theory of the case is strengthened by the addition in the act of October 22, 1914 (38 Stat. 750) renewing the tax on bankers of the words "undivided profits." The act of 1898 reads as follows:

> "That from and after July 1, 1898, a special tax shall be, and hereby is, imposed annually as follows, that is to say:

"Bankers, using or employing a capital not exceeding the sum of twenty-five thousand dollars ($25,000), shall pay fifty dollars (50); when using or employing a capital exceeding twenty-five thousand dollars ($25,000), for every additional thousand dollars in excess of twenty-five thousand dollars ($25,000), two dollars ($2), and in estimating capital, surplus shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital and surplus for the preceding fiscal year." * * * (30 Stat. 448.)

The act of 1914 reads:

"Bankers shall pay $1.00 for each thousand dollars of capital used or employed, and in estimating capital, surplus and *undivided profits* shall be included. The amount of such annual tax shall in all cases be computed on the basis of the capital, surplus and undivided profits for the preceding fiscal year." * * * (38 Stat. 750.)

Should the question of the Statute of Limitations or of the necessity of payment under protest be presented by the government, we invite the Court's attention to our brief in No. 207, Fidelity and Deposit Company v. United States, where these subjects are discussed.

It is respectfully submitted that the judgment of the Court of Claims should be reversed.

SIMON LYON,
R. B. H. LYON,
Attorneys for Appellant.

GEORGE SUTHERLAND,
Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

FIDELITY TITLE & TRUST COMPANY OF Pittsburgh, Pennsylvania., appellant,
v.
THE UNITED STATES.
No. 208.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The appellant is a guaranty and trust company engaged in the banking business in the city of Pittsburgh, Pa. Credits were opened with it by deposit of money or currency subject to be paid or remitted upon draft, check, or order, and money was advanced or loaned on stocks and bonds.

This case arises from the Treasury Department collecting taxes from the appellant under the provisions of the war revenue act approved June 13, 1898 (ch. 448, sec. 2, 30 Stat. L. 448):

> That from and after July 1, 1898, a special tax shall be, and hereby is, imposed annually as follows, that is to say:
>
> Bankers *using or employing a capital* not exceeding the sum of twenty-five thousand

> dollars shall pay fifty dollars; *when using or employing* a capital exceeding twenty-five thousand dollars, for every additional thousand dollars, two dollars, and in *estimating capital, surplus shall be included.* * * *
>
> Every * * * company * * * having a place of business where credits are opened by the deposit or collection of money * * * shall be a banker under this act. * * * [Italics ours.]

The entire capital and undivided profits of the appellant were permanently invested in real estate, stocks, bonds, and other securities covering the entire taxing period from July 1, 1898, to June 30, 1902. The use of said capital and undivided profits was confined entirely to the functions of the appellant authorized under its charter.

Appellant's statement asserts that its capital was $1,000,000; the Government contends that while appellant's capital stock was $1,000,000, yet under the revenue statute in question the word "capital" as therein used refers to and covers all money employed in the banking business, without reference to the name of the fund from which it comes, whether the same be surplus, undivided profits not definitely segregated or distributed to stockholders, counter cash, permanent investments, or of other designation.

On November 25, 1913, appellant filed application for refund—alleging the capital and undivided profits was permanently invested in real estate and securities, and that its banking business was carried on

entirely by means of the depositors' money and therefore that the capital and undivided profits were not used or employed in the banking business—in the Treasury Department under the refunding act of Congress approved July 27, 1912 (ch. 256, 37 Stat. L. 240):

> That all claims for the refunding of any internal tax * * * (collected under the war revenue act of 1898) * * * may be presented to the Commissioner of Internal Revenue on or before the first day of January, 1914, and not thereafter.

On May 8, 1917, the application for refund was rejected.

The Court of Claims found as a fact that the appellant was engaged in the banking business.

The company's *undivided profits* were carried into the profits and loss account and as such comprised the credit items in that account. The credit balance in this account increased from nothing during the first two years of the company's existence to $414,468.88 on June 30, 1898, and to $948,074.56 on June 30, 1902. To this account was debited the dividends earned and paid, the expenses of operating the entire business of the company, as well as all losses incurred. All the earnings from the various branches of the appellant's business were pooled and went into the profits and loss account. There was no segregation of the moneys received from the capital stock or the investments made therewith from the moneys derived from its earnings or the investments made therewith.

The profits and loss account was the clearing account for all the branches of the corporation's business, and in so far as it appears from the earnings and undivided "profits" shown by this account, the corporation was engaged in but one business.

The proportion of capital and accumulated profits used in the banking, trust, and vault departments is not established. The moneys received from deposits were commingled with the other moneys of the appellant and all investments were made from the general funds of the company. No physical segregation of the general assets of the company was practiced.

The Court of Claims held upon the facts as a conclusion of law that the appellant was not entitled to recover, and that the petition be dismissed on the authority of the *Union Trust Company of Indianapolis, Ind.*, v. *United States* (55 C. Cls. 424), thus applying the provisions of sections 3226 and 3227, Revised Statutes:

> SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax * * * until appeal shall have been duly made to the Commissioner of Internal Revenue * * * and a decision has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought without first having a decision of the commissioner at any time within the period limited in the next section.

> SEC. 3227. *No suit* or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * *shall be maintained in any court unless the same is brought within two years next after the cause of action accrued.* * * * [Italics ours.]

The Court of Claims held, in effect, that:

> Section 3227 prohibits the maintenance of any suit in any court unless the same is brought within two years next after the cause of action has accrued. * * * The cause of action accrued under the statute when the Commissioner of Internal Revenue rejected the claim, or, if he did not act, when his decision thereof had been delayed for more than six months. (*Kahn et al.* v. *United States*, 55 C. Cls. 271, 285.)

The appellant thereupon prayed appeal to this court.

The question therefore appears to be whether or not, in view of the above facts, the appellant can prevail in his contention that the company's capital and undivided "profits" were, because "permanently invested," not capital used or employed within the meaning of said section 2 of the war-revenue act of 1898; and, second, whether or not appellant preserved his right to sue by filing suit within the two years' time required in section 3227, R. S., in such cases provided.

The Court of Claims in the present case, which is one of 190 other substantially similar actions dis-

missed in the same manner (see 55 C. Cls. pp. 540, 542), has ruled against appellant on both questions. So also has the court held in *Schwarzchild & Sulzberger Co.* v. *Rucker* (143 Fed. 656), *Christie-Street Commission* v. *U. S.* (C. C. A., 136 Fed. 326), *Curston* v. *Rucker* (Cir. Ct. N. D. Ga., reported in Tr. Dec. 1293), and other cases shown in the brief.

II.

THE ISSUES.

There are three issues in this case.

1. Whether appellant can recover the taxes paid upon its capital.

2. Whether it can recover the taxes paid upon its undivided profits, which appellee claims was a part of its capital.

3. Whether this action is barred by the statute of limitations.

III.

FINDINGS OF FACT.

1. The lower court found that the "Capital held by the collector of internal revenue to have been used or employed by the plaintiff in the business of a banker was $1,000,000."

We submit that the court did not hold, as suggested by appellant, "that the outstanding capital was $1,000,000." (Finding II, record, 21.) It had a capital of about $4,500,000. The court does find that appellant's *capital stock outstanding* was $1,000,000.

2. On November 25, 1913, appellant filed an application in the Treasury Department, about one month before the year and five months' period expired. This was rejected May 8, 1917, or after about three and one-half years had elapsed. The petition herein was filed July 25, 1918, or nearly five years after the application was filed.

3. The bank's profit and loss account showed a credit balance increasing from over $400,000 in 1898 to nearly $950,000 in 1902. All profits of all branches of appellant's business were carried to the profit and loss account. "To this account were debited the dividends earned and paid, the expenses of operating the entire business of the company, as well as all losses incurred." There was no segregation of any moneys, or securities, or investments of any kind from any source. (Finding VI, record, 23.)

4. The income or profit from the trust business was carried to the profit and loss account. *The proportion of capital and accumulated profits used in the trust, vault, and banking departments is not established by the evidence.*

"The average amount of deposits carried for customers during the period and subject to repayment upon check, draft, or orders was $4,113,231.

"The moneys received on deposit were used by the plaintiff in the business. The moneys thus received were commingled with the other moneys of the plaintiff and all investments were made from the general funds of the company." (Finding VII, record, 24.)

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5. "No physical segregation of the general assets of the company was practiced.

"Part of plaintiff's capital consisted of its office building which, together with its other capital, it used and employed in all its business, including its banking business." (Finding VIII, record, 24.)

It had a surplus fund of $3,000,000.

The average amount of loans on stocks and bonds was $1,133,659.

IV.

ARGUMENT.

1. APPELLANT IS NOT ENTITLED TO RECOVER THE TAXES PAID UPON ITS CAPITAL.

The Government refers the court to pages 5 to 38 of its brief in No. 207, The Fidelity & Deposit Company of Maryland, now pending in this court, to sustain the tax upon the capital herein, in addition to the following four pages.

The appellant, so far as the record discloses, has been engaged in the title, trust, and banking business since its organization in 1886, and has continuously, since that date, used and employed its capital and surplus indiscriminately for the operation of its three departments without separation or segregation in any way. The average amount of deposits of appellant during the taxing period, subject to repayment upon check, draft or order, was $4,113,231; the total average amount of loans made on stocks and bonds was $1,133,659. It will be seen that its deposits were four times that of its capital, and its time loans and demand loans were in excess of its capital. The

appellant can not say that because it had an account merely called "Schedule of investments of capital stock" showing investments made only on bonds and real estate without any physical segregation of the general assets, including capital, that its capital was not used or employed in banking. If it was not used and employed in banking it was not used or employed at all in any of the business of the company, then why have a capital? Appellant certainly held out to the public with whom it did business that it had a capital, and did business with the public on that basis, and appellant can not now be heard to say that it did not use or employ that capital.

The business of appellant was conducted in its own office building, which building consisted of part of appellant's capital. The amount of capital which its building represented is not disclosed by the facts, and like all of its capital was used and employed in all of appellant's business, including banking. There is no evidence of any separation or segregation of any portion of the capital as being used and employed in the banking business and that used and employed in its other departments. The entire capital of appellant was used and employed in its entire business. All the earnings from the various branches of appellant's business were pooled and went into the profit and loss account. No attempt was made to segregate the investments made as having been made with the earnings from any particular branch of the business. There was no segregation of the moneys received from the capital stock, or the investments

made therewith, from the moneys derived from its earnings or the investments made therewith. All the moneys received on deposit by appellant were used by it in its business, and the moneys thus received were commingled with the other moneys of appellant and all investments made from the general fund.

It will be seen from this, and there is no evidence to the contrary, that appellant's entire capital was used and employed without limitation or segregation as a banker, and it does not lie with the appellant to say under these facts that because it had other departments it did not use or employ a capital as a banker. Nor is the fact that a part of appellant's capital is invested evidence that its capital was not used and employed as a banker; the capital, though invested, was available for use and was employed to carry on its business of banking. In order to recover the tax or any part thereof, appellant must show by positive proof that its capital was not used or employed in banking, and this the appellee insists it has utterly failed to do and is not therefore entitled to recover any part of the tax. Appellant, relying entirely upon the theory that during the taxing period it was not a banker, and that no part of its capital was used or employed as a banker, or in the business of banking, has failed in every particular to sustain that theory by evidence sufficient to warrant a recovery. The mere statement that an amount equal to its capital stock was invested in securities is not proof that its capital was not used and employed

as a banker, and the Court of Claims found as a fact that appellant's capital was used and employed as a banker and in the banking business. The having of a capital available for use as a banker, on the basis of which the banking business is conducted, is the proper construction of this act and to avoid the tax appellant must show that no capital is used or employed for the conduct of the banking business. And if a capital is employed and used, how much and in what proportion? The employing of capital does not necessarily mean an actual use of it but rather having it available for use when and as needed or desirable. In the case at bar it is submitted that appellant's capital was held and used in the amount upon which the tax was paid, and as a basis for the operation of the banking business, and that the capital was employed in the business of banking.

2. APPELLANT IS NOT ENTITLED TO RECOVER THE TAX UPON UNDIVIDED PROFITS FOR THE REASON THAT SUCH TAX IN THE INSTANT CASE IS A TAX UPON THE CAPITAL.

It makes no difference what name the collector gave the amounts which were assessed; if the amount assessed was really employed in the banking business, the tax must stand.

The tax was to be levied upon "bankers using or employing a capital."

In my opinion it makes no difference from what source the fund employed came. The only question is, Was it employed?

Why the official who levied the tax said that he levied it on undivided profits I do not know; neither do I care. For it makes no difference what he called it, if it were employed in the business, it became "capital employed," and was subject to the tax. All profits of the company went into this account. Investments were made from this account. All expenses and dividends to depositors were paid from this account. The profit and loss account was absolutely employed in the business. The average amount of money loaned from this account was $1,133,659.

If appellant owed the amount of tax collected, it matters not how the collector classified the amounts he used in making the levy. If the result is right, the method is not important.

In *Anderson* v. *Farmers' Loan & Trust Co.* (241 Fed. 326, 154 C. C. A. 202) Judge Hand says:

> Upon the most familiar principles one can not by suit recover any taxes once paid, which in fact were due even though the exact manner of their collection was not authorized.

(a) Counter Cash.

The counter cash came from the undivided profits. How much was used is not shown. *It surely was capital employed in the business.*

(b) Undivided Profits are Capital.

In *Anderson* v. *Farmers' Loan & Trust Co.* (241 Fed. 326) the court said:

> The capital, surplus, and undivided profits which counsel for the defendant in error insists

were not employed in banking, but were permanent investments, we regard as employed in all the business of the bank of every kind. They were available for any use, equally with all other assets of the company, and were therefore employed both in the banking and other business. And this is because the words "capital, surplus, and undivided profits" relate to no particular kind of property, but are expressions describing the amount of the residue of the assets after the liabilities have been deducted.

We do not regard any specific assets as constituting capital of the company. The capital and in the same way the surplus and undivided profits, are the residue left after paying the obligations of the bank to its depositors, and any other indebtedness it may have. These claims may be satisfied out of any property, and the balance remaining, which is the capital, surplus, and undivided profits, is to be imputed equally to all kinds of property which the trust company may possess. The proper way, therefore, to determine what part of the capital, surplus, and undivided profits is employed in banking, is to find out what part of the total assets is so employed; when that is done, the same proportion of the capital, surplus, and undivided profits must be thus employed. Any other construction of the act seems to us unreasonable, and to involve the almost inevitable result that trust companies, which are close competitors of the national banks (at times outstripping them in banking business), will be found to be entirely free from

a tax which the national banks will have to pay.

In the case of *Germantown Trust Company* v. *Lederer* (263 Fed. 672) the court held that the evidence was not sufficient to sustain a finding that the plaintiff's capital, surplus, and undivided profits were not used or employed in banking, and went on to say at pages 675 and 676:

> What constitutes capital, and how and in what amount it is employed in different departments of a trust company, including that of banking, is a question of fact to be determined by the use to which its assets of different kinds are put, and established by evidence of real transactions.

The case of *Bailey* v. *Clark* (21 Wallace, 284) is relied upon by appellant as sustaining its contention. It seems quite clear, however, that it sustains the Government. On page 288 it says:

> It is undoubtedly true, as stated by the Attorney General, that capital used in the business of banking is none the less so because it is borrowed.

In the case of *State Savings Bank* v. *City Council* (98 Iowa, 737) the court says at page 739:

> In order to ascertain the legislative intent, it is necessary to determine what is meant by the words "paid up capital," as used in the part of the act we have quoted. The word "capital," as applied to the money of a corporation, may refer to the money paid in by the stockholders for the use of the corporation,

> and commonly known as the capital stock; but, in a wider and more popular sense, *it includes all the money and other property of the corporation used in transacting its business.*

In the case of *State ex rel. Bank* v. *Board of Assessors et al.* (48 La. Ann. Repts. 35) the court uses the following language at page 37:

> In its broadest meaning capital signifies actual estate, whether in money or property, owned by an individual or corporation. (23 N. Y. 192.)
>
> It is the fund upon which a corporation transacts business *which is liable to its creditors* and in case of insolvency, passes to a receiver. (28 Barbour, 320.)

Under section 207 of the act of October 3, 1917 (C. 63, 40 Stat. L., 306; Comp. Stat., sec. 6336 3/8*h*), the term "invested capital" is defined as follows:

> (*h*) In the case of a foreign corporation or partnership or of a nonresident alien individual the term "invested capital" means *that proportion* of the entire invested capital, as defined and limited in this title, which the *net income* from sources within the United States *bears to the entire net income.*

In *Real Estate Title Insurance & Trust Co.* v. *Lederer* (229 Fed. 803) banking was a part of its business.

The court says:

> It lays claim to the benefit of the principle of exemption from taxation which it asserts

to have been applied in the cases of *Central Trust Co.* v. *Treat* (171 Fed. 301) and *Treat* v. *Farmers* (185 Fed. 760, 108 C. C. A. 98).

If the principle there applied is as broad as it is claimed to be, and can be upheld as law and is applicable, it undoubtedly rules the present case in favor of the plaintiff. It is confidently asserted that the rule established by these cases is that, if the moneys received from depositors are kept separate from the other moneys of the bank and are invested in securities which are likewise kept separate from the other investments of the bank, and no more in amount of the moneys of the bank are invested in commercial paper by discount or purchase than is represented by the investments made of deposit moneys, the other moneys of the bank being invested in so-called permanent (whatever this may mean) forms of investment, then the legal inference is that no part of the capital of the bank is invested in banking except the sums which may have been spent for a banking house or banking fixtures and the like.

We do not understand any such principle to be deducible from the rulings in the cited case. There are, it is true, some expressions in the opinions accompanying the rulings which supply plausible support to the argument of counsel for plaintiff. As has been often remarked, however, opinions are to be read in the light of the facts of the case to which they relate. The cited case was decided as a case stated, the facts being stipulated. It, more-

over, arose under a different act of Congress. *The agreed fact* was that the *capital* of the bank in that case was *invested in securities which had no relation to banking,* and that all the funds of the bank which were in any way used or employed in banking were moneys belonging to depositors, *and that no part of the capital or surplus of the bank was so used or employed.* It was no part of the duty of the court—indeed, it was powerless—to change the effect of the stipulation. The agreed fact being that the banking business was carried on without any capital being employed, the court could not do otherwise than rule that no tax was payable. This is a very different thing from ruling as a matter of law that, if some of the moneys of a bank were invested in commercial paper, and some in other forms of investment, and if the aggregate investments in commercial paper do not exceed the aggregate sum owing to depositors, no part of its capital is used or employed in banking.

There are at least two seemingly unsurmountable obstacles in the way of reaching such a conclusion. One is how the character of the investments in which the banker puts his money can make any difference. * * *

It must be, however, that granted one is a banker and has money in the banking business, the character of the investments he makes of these moneys can have no bearing upon the question of the amount of capital he has invested in that business.

The other obstacle is the utter impossibility of its being held as a matter of law that the

> capital, surplus, or undivided profits of a bank, either separately or in a lump, can be segregated from its other assets and identified as such. The loose phrases in common use which might seem to imply such a possibility it is well understood do not. A bank or trust company might be said to have invested its surplus in the erection of a banking house or an office building. Everyone understands that all that is meant by this is that it has so invested a sum equal to a certain part of its estimated accumulated profits. Surplus and kindred words are nothing more than banking expressions. It is certainly clear that in no legal sense can either capital or surplus be earmarked as a concrete thing.

Anderson v. *Farmers' Loan & Trust Co.* (241 Fed. 322, 327):

> The case at bar seems somewhat different. In the first place, it is doubtful if any such occasion for the existence of the investments appeared in the Spreckles case as in the case of a banking institution where large reserves are so important to the conduct and success of business. These investments, as the undivided profits in the case of *Leather Manufacturers' Bank* v. *Treat, supra*, are all to be regarded as employed in the business of the company.

In affirming a decision of the District Court holding an assessment valid which was made under the act of June 13, 1898, on capital as including a sum which was standing on the books of the company under the

profit and loss account, which it was claimed represented undivided profits, the Circuit Court of Appeals, in *Leather Manufacturers' National Bank* v. *Treat* (128 Fed. 262), said:

> The argument at the bar has been largely directed to the question whether the undivided profits are "surplus" within the meaning of the statute. The provision for including "surplus in estimating capital" was probably inserted to remove the doubt created by a decision of Mr. Justice Nelson in construing a former statute which imposed a tax upon capital as taxing only the share capital of a banking corporation. (*Bank* v. *Townsend*, 5 Blatch. 315, Fed. Cas. No. 9381.) The provision would seem to have been unnecessary, as without it, when a statute, as this does, levies a tax upon the capital used or employed by bankers generally, firms and individuals as well as corporations, the meaning is to tax all the money and assets invested in the business as the basis of profits (*Bailey* v. *Clark*, 21 Wall. 284; 22 L. Ed. 651), not only the original investment, but also the additionals and accretions.

And further at page 265:

> Upon the facts set forth in the complaint, there is nothing to distinguish the undivided profits in controversy from the fund which many banking associations carry for years under that name, and which, though not technically surplus or theoretically capital, are actually a part of the capital of the bank. There is nothing in the circumstance that

> they were considered by the bank as a fund applicable to extra dividends, and to unexpected losses, and to depreciation of assets, to distinguish such accumulations from the technical surplus fund of the bank. Extra dividends are not infrequently declared by banking corporations out of that fund, and that fund is of course applicable to the payment of losses, and, so far as it serves to offset depreciation of assets, it replaces diminished capital.

In the case of *Germantown Trust Co.* v. *Lederer* (263 Fed. 672), under the act of October 22, 1914, the court held that the evidence was not sufficient to sustain a finding that the plaintiff's capital, surplus, and undivided profits were not used or employed in banking, and went on to say at page 675:

> What constitutes capital, and how and in what amount it is employed in different departments of a trust company, including that of banking, is a question of fact to be determined by the use to which its assets of different kinds are put, and established by evidence of real transactions. (*Real Estate Title Insurance & Trust Co.* v. *Lederer, Collector,* 263 Fed. 667; — C. C. A. —).

In the case of *The Sun Mutual Ins. Co.* v. *The Mayor of N. Y.* (8 N. Y. 241, 249, 250), the court said:

> By the payment of the premium, the assured is entitled to indemnity, but the same act constitutes him a stockholder, and in that capacity he acquires a new interest in the

fund he has parted with, for a full consideration. The money becomes capital to the company of which he is a member, to be used in sustaining its credit, in paying losses, in investments by way of loan, the proceeds of which are ultimately to be divided among the stockholders.

Again, it is said that profits are not capital, and therefore can not be taxed as such. This may be conceded as an abstract proposition. But the appellants must go further, and prove that profits can not be made capital, either by contract or the *act of the legislature*. In ordinary copartnerships, where profits, by the agreement of the partners, are directed to accumulate, as a basis of credit or of more extended operations in a particular business, they become capital * * *. * * * These accumulations became capital, and liable for all debts of the corporation.

In *State Savings Bank* v. *City Council* (98 Iowa 737, 739, 740), the court said:

The word "capital" as applied to the money of a corporation may refer to the money paid in by the stockholders for the use of the corporation, and commonly known as the capital stock; but, in a wider and more popular sense, it includes all the money and other property of the corporation used in transacting its business. * * * (740) Our conclusion is that, *so long as the profits* are used as a part of the working capital of the bank and are not set apart for the use

of the individual stockholders, they should be treated as *a part of the paid-up capital* of the bank.

3. THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

(*a*) The tax for which suit was filed was paid under the war revenue act of 1898.

(*b*) The refund act is dated July 27, 1912.

(*c*) Appellant filed his application in the Treasury Department November 25, 1913.

(*d*) The six months' period at the end of which appellant could have brought suit expired May 25, 1914.

(*e*) Suit was brought in the Court of Claims July 25, 1918, four years and two months after the time when suit could have been filed.

(*f*) The two-year limitation under section 3227 of the Revised Statutes expired May 25, 1916.

The right of action accrued on May 25, 1914, six months after the application was filed with the commissioner.

In *Wright* v. *Blakeslee* (101 U. S. 174, 180) this court quoted the statute of 1872 as follows:

> *Provided*, That actions for claims which had accrued prior to the passage of the act should be commenced in the courts or presented to the commissioner within one year from the date of such passage; * * *.

The court then said:

> The parties, therefore, had by the act one year to present their claim to the commis-

> sioner; and it was thus presented on the 3d day of January, 1873, within the time allowed for that purpose.
>
> The commissioner rendered his decision on the 3d day of July, 1873, and then, for the first time, the parties had a right to bring suit against the collector. Then their cause of action first accrued against him. * * * And as it appears from the findings of the court that this suit was commenced by delivery of the summons to the sheriff on the 15th of June, 1875, it is apparent that the defence of the statute of limitation can not be maintained.

Under the present statute, suit may be brought six months after the claim is filed with the commissioner, unless the commissioner decides the case sooner; then, of course, the action accrues when the decision is rendered.

In the case of *Stewart* v. *Barnes* (153 U. S. 456–458), Stewart paid internal-revenue taxes June 26, 1869, under law of 1866. He appealed to the commissioner, his claim was rejected, and he brought suit April 25, 1887.

The defense was the statute of limitations. This court said:

> Under the later act, if the commissioner delayed his decision for more than six months, the claimant was not compelled to await it, but might have sued within six months next following the six months of the commissioner's delay, or one year from the time of appeal.

In other words, this court held that suit might be brought at the end of six months; hence in the instant case the statute began to run May 25, 1914, and this action is barred.

Christie-Street Commission Co. v. *United States* (129 Fed. 506, 508):

> As this suit was not brought until November 14, 1902, it is barred by the statute of limitations. (Sections 3226, 3227, Rev. St.) See opinion herein. (126 Fed. 995, 996; *Commissioners, etc.*, v. *Buckner et al.* (C. C.), 48 Fed. 535.)
>
> Nor is the position tenable that the running of the statute of limitations in question was suspended during the pendency of the appeal before the Commissioner of Internal Revenue. (*United States* v. *Utz*, 80 Fed 849; 26 C. C. A. 184.) While that was an action based on an express contract, and was therefore clearly within the provision of the act of 1887 conferring jurisdiction on the United States court in such action, in which the sixty years' limitation applies, it is direct authority against the contention of the plaintiff that the running of the statute is suspended while such claim is being considered by one of the departments of the Government. Indeed, as applied to the case at bar, the provision of section 3226, Rev. St. U. S., is too explicit to admit of debate. The only exception made to the two years' limitation therein prescribed is in the proviso "that if such decision is delayed more than six months from the date of such appeal, then the said

suit may be brought, without first having a decision of the commissioner at any time within the period limited in the next section"; that is, section 3227, which declares that:

"No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority or of any sum alleged to have been excessive, or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued."

Christie Street Commission Co. v. *United States* (126 Fed. 991):

(991, 992) Philips, district judge: The plaintiff brings suit against the United States to recover back the sum of $4,811.76, alleged to have been unlawfully demanded of it and received by the collector of internal revenue at Kansas City, Mo., under the act commonly known as the war revenue law of 1898.

(996) So, in *Snyder* v. *Marks* (109 U. S. 189, 193), Mr. Justice Blatchford, in discussing a kindred question, said:

"The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the Circuit Courts of the United States, and we are satis-

fied it is a correct view of the law. * * * The system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted, was a system of corrective justice, intended to be complete, and enacted under the right belonging to the Government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues."

It has been held that where a right of action does not exist at common law, but is given by virtue of an enabling statute, wherein there is a specified limitation on the right to sue, such limitation becomes an integral part of the cause of action, and after the lapse of the prescribed period the right of action is at an end. The prescribed period is a condition precedent to the right of action, and is not a mere limitation on the remedy. * * *

(996, 997) The contention of plaintiff's counsel, to extricate himself from the dilemma of the statute of limitations, is that the period of limitation applicable to this case is prescribed in the proviso to Section I, subd. 2, of the act of March 3, 1887, which is as follows:

"That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made." (24 Stat. 505.)

There are several answers to this suggestion. Jurisdiction is conferred on the Court of Claims, which also applies to United States courts, by the first section of said act, such as claims founded upon the Constitution of the United States, or any law of Congress, or upon any contract, expressed or implied, with the Government, or for damages, liquidated or unliquidated, in cases not sounding in tort, etc. As there is no special limitation of law as to most of these actions, Congress, in said proviso, fixed the ultimate limit at six years. *It is, however, a well-settled rule of construction of such statutes that such general provision does not conflict with a special limitation declared in another statute, creating a particular cause of action, and prescribing the time within which it shall be brought.*

There is an important reason why Congress should prescribe a short limitation in respect of suits and proceedings to recover back moneys paid as taxes under the internal revenue laws. Such taxes are the principal source from which revenue is derived for the support and operation of the General Government. It is altogether important that Congress, in making annual appropriations, should know from time to time what amounts of revenue have hitherto been raised within the approximate preceding period through the Internal Revenue Department, and how much money is on hand. [Italics ours.]

United States v. *Utz* (80 Fed. (C. C. A.) 848, 851):

Now, the petitioners' right having fully accrued in February, 1888, the six-year

limitation began to run then. The presentation of the claim to the Treasury Department in the year 1893 did not stop the running of the statute, nor was the petitioners' right of action suspended during the investigation of the claim by the executive officers. The forbearance of the claimants to sue was altogether voluntary on their part, and it is not within the power of the court to relieve them from the consequence of their failure to comply with the condition of the statute.

There was a complete cause of action in the plaintiff six months after appeal had been filed with the commissioner, and the two-year limitation in section 3227, R. S., commenced at that time.

Up to six months after appeal had been filed no cause of action accrued in the plaintiff, and it was prohibited from bringing suit before that date; at that time the right to sue fully accrued.

(a) *Definition of terms used in section 3227, Revised Statutes—*

Cause of action is defined as the right which a party has to institute and carry through a proceeding (Anderson L. Dict.); the right to bring a suit (Black L. Dict.); the ground on which an action may be sustained (Black L. Dict.), and is synonymous with right of action (*Graham* v. *Scripture*, 26 How. Prac. N. Y. 501).

"*Accrued*" and computation of statutory period:

The accrual of the cause of action means the right to institute and maintain a suit; and whenever one person may sue another a cause of action

has accrued and the statute begins to run. (25 Cyc., 1066; *Larason* v. *Lambert*, 12 N. J. L. 247; *Eller* v. *Church*, 121 N. C. 269.)

The statute of limitations begins to run from the time when a complete cause of action accrues, that is, when a suit may be maintained. (25 Cyc. p. 1065 and cases cited.)

Amy v. *Dubuque* (98 U. S. 470), Mr. Justice Harlan stated:

> (P. 474) In *Wilcox* v. *Plummer's Executors* (4 Pet. 172) it was said: "The ground of action here is a contract to act diligently and skilfully; and both the contract and the breach of it *admit of a definite assignment of date. When might this action have been instituted is the question;* for *from that time the statute must run.*" (Angell, Limitations, sec. 42; 2 Saunders, Pl. and Evid. 309.)
>
> (P. 476) A cause of action accrues from the time the right to sue for the breach attaches.

Where two remedies accrue at different times, the statute begins to run from the time when the right to pursue the earlier remedy accrues.

> *Parmelee* v. *Price* (105 Ill. App. 271).
>
> *Conklin* v. *Furman* (8 Abb. Pr. N. S. (N. Y.) 161, affirmed 48 N. Y. 527).

Under section 3226, R. S., the cause of action accrues six months after an appeal to the commissioner, unless the appeal is acted upon by him within the six-months period, in which case the cause of action accrues when the appeal is decided. The statute makes the period within which a suit may be

commenced begin with the date on which the *cause of action accrues.* It is true that an appeal to the commissioner is a condition precedent to the right of suit; but it is not true that no suit can be maintained until there has been a decision by the commissioner. On the contrary, it is expressly provided that, if the commissioner delays action for more than six months, the taxpayer may sue without waiting for a decision. At all events, then, the right to sue accrues six months after the date of the appeal unless it has sooner accrued by a decision of the commissioner rejecting the appeal.

But for the decision in *Wright* v. *Blakeslee* (supra, 174, 180), the statutes would be open to the construction that the cause of action on which both the appeal to the commissioner and the suit in court are predicated accrues when the taxes are paid. In the case referred to, however, it was decided that the cause of action accrues at the first moment when the right to sue exists.

This was an action to recover succession taxes under the act of 1864, in which it appears that the tax was paid under protest July 21, 1867; claim for refund filed January 3, 1873, which was rejected by the Commissioner of Internal Revenue on July 3, 1873. Suit was brought on June 15, 1875.

In that case the commissioner's decision was rendered exactly six months from the date of the appeal. If it had not then been rendered a suit could have been commenced the next day without waiting for a decision. The principle is that the moment the right

to sue exists the cause of action has accrued, and when the cause of action accrues the taxpayer has two years in which to sue. In *Wright* v. *Blakeslee*, supra, the two years dated from the decision of the commissioner, because that decision was rendered within six months after the appeal, and hence the right to sue then for the first time accrued. On the same principle, if no decision is rendered within six months, the period of limitation must date from the termination of that six months, because a delay of that length gives exactly the same right to sue that arises from a decision.

There is nothing in sections 3226, 3227, and 3228 of the Revised Statutes which in terms prescribes, under any circumstances, a period within which suit may be brought as beginning with the date of the decision of the commissioner, unless that decision is rendered within six months after the date of the appeal. The result is that if a decision is made within six months, the suit must be brought within two years from the date of the decision. If the decision is delayed beyond six months, the two-year period of limitation begins to run six months after the appeal.

In the case of *Stewart* v. *Barnes* (153 U. S. 456) the court referred to the acts of 1866 and 1872. The act of July 15, 1866 (sec. 19, 14 Stat. 93, 152), did not contain a provision that the suit should be brought within two years *after the cause of action accrued*. On the contrary it required such suit to be brought

within six months after a decision by the commissioner or within six months after the act becomes effective, but it permitted suit to be brought six months from the date of the appeal to the commissioner. The act of June 6, 1872 (c. 315, sec. 44, 17 Stat. L. 257, which is now sec. 3227, Revised Statutes), for the first time introduced a requirement that suit be brought within two years next *after the cause of action accrued.* It contains no provision for a period of time after the decision of the commissioner within which suit may be brought, except when that decision is made within six months from the time the claim was filed.

The provision of the act of 1866, permitting suit to be brought after the lapse of six months from the appeal, was retained, but that provision for a suit within six months after the decision was discarded. In its place, the provision of the act of 1872 requiring suit to be brought *within two years after the cause of action accrued* was used.

In *Wright* v. *Blakeslee*, supra, the right to sue having first accrued by decision of the commissioner, within six months of the appeal, it was held that the two years within which suit might be brought commenced with the date of the decision. In *Stewart* v. *Barnes*, supra, it was said that where the appeal was not decided within six months and the right to sue therefore first accrued upon the lapse of six months from the appeal, the two-year period commenced with that date and expired two years later, but that by virtue of the proviso, which applied to claims originating

prior to 1872, if the taxpayer did not choose to sue within the two-year period he could await a decision by the commissioner and sue not within two years but within one year thereafter. In that case a claim had arisen before the passage of the act of 1872, but it does not appear whether the appeal to the commissioner was taken before or after the passage of the act of 1872. The right to sue within one year after the decision, however, must necessarily be referred to the proviso in regard to claims originating prior to 1872, for there is no other part of the act which mentions in any way a period of one year, or any period beginning with the decision of the commissioner. The same is true of the statutes as carried into the Revised Statutes. The only period of two years mentioned begins with *the accrual of the cause of action*, and the only period commencing with the decision by the commissioner is a period of one year in regard to claims originating prior to 1872 mentioned in the proviso. The claims here not originating prior to 1872 the one-year proviso mentioned in *Stewart* v. *Barnes*, supra, of course does not apply and hence every suit based on a claim arising after that date must be brought within two years after the right to sue accrued, which at the latest is six months from the filing of the appeal.

The Circuit Court of Appeals, Eighth Circuit, in the case of *Christie-Street Commission Co.* v. *United States* (136 Fed. 326) and the Circuit Court in the same case (reported in 126 and 129 Fed.) and also the Circuit Court, Northern District of Georgia, in

the case of *Schwarzchild and Sulzberger Company* v. *Rucker* (143 Fed. 656), held that the cause of action accrued six months after the appeal to the commissioner, if the decision was not sooner rendered, and that the suit was barred two years thereafter. The Circuit Court for the Northern District of Georgia in the case of *Curston* v. *Rucker*, an unreported case set forth in Treasury Decision 1293, held that suit must be brought within two years after the tax was paid.

In *Christie-Street Commission Co.* v. *Anderson* (126 Fed. 991, affirmed in 136 Fed. 326), which was an action to recover stamp taxes under the act of 1898, the taxes were paid from July 1, 1898, to August 15, 1899, and a claim for refund was filed October, 1899, on which no action was taken by the Commissioner of Internal Revenue. Suit was thereupon filed on November 14, 1902, and the court says (p. 996):

> This suit was filed on the 14th day of November, 1902, more than three years after the payment of said taxes by the plaintiff, and two and one-half years after the lapse of the six months following the presentation of the claim to the Commissioner of Internal Revenue for review. The six months alleged by the statute to the commissioner for the investigation of the claim and decision thereon was deemed by Congress to be a reasonable delay after the presentation of the appeal to him by the taxpayer; and he having failed, neglected, and refused, as the petition alleges, to act thereon, the right of action under the statute accrued to the plaintiff in April, 1900.

So that the cause of action accrued more than two years before this suit was brought. The cause of action accrues, within the meaning of the statute of limitations, as soon as the actor has the right to sue, and not when he sees fit to proceed. (*Tapley et al.* v. *McPike*, 50 Mo. 589, 591.)

It has been held that where a right of action does not exist at common law, but is given by virtue of an enabling statute, wherein there is a specified limitation on the right to sue, such limitation becomes an integral part of the cause of action, and after the lapse of the prescribed period the right of action is at an end. The prescribed period is a condition precedent to the right of action, and is not a mere limitation on the remedy. (*Railroad Company* v. *Hine, Administrator*, 25 Ohio St. 629; *Eastwood* v. *Kennedy*, 44 Md. 563; *Boyd, Administrator* v. *Clark*, 8 Fed. 849; *Finnell* v. *Southern Kansas Ry. Co.*, 33 Fed., 327.)

The case was heard again on amended petition. After reaffirming its former position, the court denied the contention that the statute was suspended during the time that the appeal was pending before the Commissioner of Internal Revenue, and held that since the statute conferred the right to sue six months after appeal, if the decision was not sooner rendered, the cause of action accrued at that time.

The Circuit Court of Appeals in the case of *Christie Street Commission Co.* v. *U. S.* (136 Fed. 236) affirmed the lower court.

> (P. 333) Nor is the second contention of counsel upon the question more persuasive. The premises upon which they base their argument are unsound, and their conclusion is inadmissible. * * * The logical and unavoidable conclusion is that it was barred by the limitation of section 3227, because it was not commenced until more than two years after the cause of action it presents accrued.

This case is quite fully quoted in appellee's brief in No. 207. However, I desire to call the attention of the court to a few additional facts.

Taxes were paid under the statute of 1898 between July 1, 1898, and August 15, 1899.

December 9, 1899, plaintiff filed its claim with the commission.

November 30, 1902, suit was brought in the United States Circuit Court.

The commission never did decide the appeal.

From the above it appears that the claim was presented to the commissioner in due time. On June 9, 1900, plaintiff might have brought suit.

It brought suit November 30, 1902, just two years five months and 21 days after the six-month period expired.

The court held that the two-year statute of limitations applied and affirmed the judgment of the lower court, dismissing the suit.

In *Schwarzchild & Sulzberger Co.* v. *Rucker* (143 Fed. 656), which was an action to recover oleomargarine taxes paid under protest, January 25 and 28, 1902, claim for refund was filed March 18, 1902, and rejected October 9, 1903. Suit was thereupon filed

on December 28, 1904, and the Circuit Court said (p. 656):

> As to these two items the question raised by this demurrer is as to when the cause of action accrued. The language of section 3226, Rev. St., is as follows:
>
> "No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provision of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought without first having a decision of the commissioner at any time within the period limited in the next section."
>
> The next section here referred to is section 3227, so much of which as is material here reads as follows:
>
> "No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any

court, unless the same is brought within two years next after the cause of action accrued."

It will be perceived from this that the plaintiff had a right to sue in six months after the appeal was taken to the commissioner, which was six months after March 18, 1902, as to both of these items; that is, September 18, 1902. It seems to me perfectly clear from the two sections of the Revised Statutes referred to, and which seem to be controlling here, that the plaintiffs' cause of action accrued six months after the appeal was taken to the Commissioner of Internal Revenue. The language is:

"That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the commissioner at any time within the period limited in the next section."

The very language which fixed the right to sue within six months, if the commissioner shall fail to act within that time, refers also to the limitation period, and it is evident that the cause of action accrued after the expiration of six months from the time of entering the appeal. I think this is about as clear as anything can be.

By sections 3226 and 3227 R. S. the taxpayer may not sue until after an appeal has been made to the Commissioner of Internal Revenue and a decision rendered thereon, unless such decision is delayed for more than six months from the date of such appeal, then the taxpayer may sue, but under section 3227 he may not sue at any time he may

choose before the commissioner renders his decision but *only within two years next after the cause of action accrues.* His cause of action first accrues when he first has a right to sue, namely, six months after appeal to the commissioner, as in *Wright* v. *Blakeslee,* supra, and after that time he may sue at any time while his appeal is pending, provided he sues within two years. Two years, therefore, is the limit upon the time in which he may sue during the time his appeal is pending before the commissioner. If the decision of the commissioner is rendered in the meantime, it does not stop the statute from running, nor is there any period after the decision of the commissioner in which the taxpayer may bring suit which does not date from six months after the claim was filed.

A still different construction was placed on *Curston* v. *Rucker,* supra, involving taxes on distilled spirits where the assessment was made July, 1903, and a plea in abatement filed and rejected February 6, 1904. The tax was paid on March 28, 1904, and suit brought on February 19, 1907. The defendant demurred on the ground that the suit was barred by the statute of limitations and the court in sustaining the demurrer said:

> The question * * * is when the cause of action here accrued. The tax, the penalty, and interest in question were paid March 28, 1904, and this suit was brought in the State court February 19, 1907, and removed to and filed in this court February 25, thereafter. It is clearly barred, therefore, unless plaintiff

> was legally required to present the claim for refund, notwithstanding the fact that application for abatement had been made and considered on the merits. * * * *If the plaintiff could have brought this suit* in March, 1904, the two years within which he could sue under the statute had elapsed seven months before he commenced this suit, so that the case is clearly barred—

that is to say, suit must be brought within two years after the tax is paid.

We think the correct construction was placed on these statutes in *Christie-Street Commission Co.* v. *United States,* that the cause of action accrued when the claimant first had the right to sue. If the decision of the commissioner is announced before the expiration of six months from appeal, the right to sue then arises; if it is delayed more than six months, the right to sue arises when the six months has expired.

The phrase "accrual of the cause of action" as used in section 3227 is a well-understood legal phrase and it is therefore presumed that Congress used it in its accepted legal meaning, unless a contrary intention clearly appears. This meaning when used in statutes limiting the right to sue is universally understood to mean "the right to prosecute an action with effect." And the courts so defining it say "a statute of limitations begins to run when a complete cause of action accrues; that is, when a suit may be maintained and not until then."

In *Cary* v. *Koerner* (200 N. Y. 253), Judge Willard Bartlett said at page 259:

> The time when "the cause of action has accrued," as that term is used in those provisions of the Code of Civil Procedure limiting the periods within which actions must be commenced, means the time when the plaintiff first became enabled to maintain the particular action in question,

and in *Jacobs* v. *Mexican Sugar Refining Company* (93 N. Y. Supp. 776) the court said at page 782:

> In Bouvier's Law Dictionary a "cause of action" is defined as "matter for which an action may be brought." "A cause of action is said to accrue to any person when that person first comes to a right to bring an action." Thus, if the plaintiffs have a right to bring the action, they have a cause of action to enforce that right.

If this was the meaning in the mind of Congress in using the phrase, clearly the "right to maintain the suit" arose six months after the appeal or sooner if the commissioner's decision was sooner announced.

We have been unable to discover any indication of an intention that the phrase should bear a different meaning. If the cause of action in all cases accrued only with the commissioner's decision, then Congress must have used the phrase in other than its accepted meaning; but there are several very persuasive indications that Congress recognized that these events were not always coincident. In the original act of 1866, the limitation was placed at "six months from the time of said decision," or, if the decision was not rendered in six months, then "within twelve months

from the date of such appeal." Under this act the two events that could cause the statute to begin to run were "decision" and "appeal." But, when the amendatory act of 1872 was passed, both these phrases were dropped in the primary enactment and the phrase "*accrual of the cause of action*" substituted. The abandonment of the two terms negatives the idea that the events they described continued always to start the statute in operation.

Moreover, the proviso taking certain cases out of the primary provision reverts to the term "decision of the commissioner." Congress then had two phrases in mind, using one in one place and the other in another. If they were understood to be equally applicable to the same event, there was no necessity for the introduction of the new phraseology; nor having been introduced, was there any necessity or logic in retaining the old phrases; a multiplicity of terms to describe the same thing could not but cause confusion. We must then conclude that they were used to describe things that sometimes at least were different. "Accrual of the cause of action" is a general term, covering different events; "decision of the commissioner" is a specific term, covering but one event.

Again, if "accrual of the cause of action" was intended always to mean "date of the commissioner's decision," there was no reason for this proviso in section 3227, R. S.:

> That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from that date; *and that where any such claim*

*was pending before the Commissioner, * * * an action thereon may be brought within one year after such decision and not after.* [Italics ours.]

It was inserted because Congress recognized that some cases, no doubt, had been pending before the commissioner at the time of the passage of the act, in which the six months after appeal had elapsed by more than two years. To avoid cutting off such complainants from the right to sue, they were allowed one year from the commissioner's decision. But, if the commissioner's decision and the accrual of the cause of action were always synonymous, this priviso was unnecessary, for then claimants in whatever situation would still have two years from such decision in which to bring suit.

It seems clear then that Congress used the phrase in its accepted meaning, that is, when a suit could first be maintained. That time was when the commissioner decided the appeal within six months or six months after appeal if he delayed his decision that long. While it was not obligatory to use at the end of six months, the right to do so was fully perfected. Manifestly a claimant can not prevent the statute from running by a refusal to act. The purpose of such statute is to compel persons to act; if they act at all, to act while the matter is fresh in the minds of the parties.

It is evident that if the cause of action does not accrue until the decision of the commissioner, then any suit brought before that date, even if brought more than six months after the claim for refund

was filed would be subject to demurrer on the ground that it did not state facts sufficient to constitute a cause of action. However, it is evident from the plain terms of the statute itself that suit can be brought after six months and that a demurrer would be overruled, for the statute says:

> If such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the commissioner at any time within the period limited in the next section.

It is submitted, therefore, that the cause of action under section 3227, R. S., accrues when the claimant first has the right to sue, and that is six months after the filing of a claim for refund, which is the appeal to the commissioner, providing that the decision of the commissioner is not rendered within the six months' period. In the latter event the cause of action arises on the date of the decision, and suit must be brought within two years thereafter. The failure of the commissioner to make his decision within six months after an appeal to him is tantamount to a rejection of the claim, and the cause of action accrues to the same extent as it would upon his formal rejection.

A proper construction of sections 3226 and 3227 is as follows: A claim for refund must be filed, and suit can not be brought for six months thereafter unless the decision of the commissioner is rendered within that time, whereupon suit can be brought

at once (sec. 3226). Suit must be brought within two years after the claimant has established his right to bring suit under section 3226 (sec. 3227).

In the case at bar the plaintiff complied with section 3226, but did not bring suit within two years after his cause of action accrued, as required by section 3227, and therefore has no right to maintain the present suit.

4. APPELLANT'S AUTHORITIES DISTINGUISHED.

The cases relied upon by appellant in its brief upon the question that the limitations do not bar recovery are distinguished in the brief in case No. 207.

It is submitted that those cases have no application to limitations as raised by the facts herein.

5. CONCLUSION.

It is therefore submitted that the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.
ROBERT H. LOVETT,
Assistant Attorney General.

Of counsel:

CARL A. MAPES,
Solicitor of Internal Revenue.
B. H. LITTLETON,
Special Attorney, Internal Revenue.

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In the Supreme Court of the United States

OCTOBER TERM, 1921.

FIDELITY TITLE & TRUST COMPANY OF Pittsburgh, Pennsylvania, appellant,
v.
THE UNITED STATES.
No. 208.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S SUPPLEMENTAL BRIEF.

The reply brief of the appellant cites two new cases and the appellee feels it necessary to comment upon those two cases as follows:

It is true that in the case of *Merck* v. *Treat*, 174 Fed. 388, a different view of the statute than the one expressed above is taken. It clearly appears, however, that the court in that case failed to recognize that the sections of the Revised Statutes under consideration for the first time introduced the phrase "*next after the cause of action accrued.*" The *theory* of the opinion seems to be that the case was similar to that of *Arnson* v. *Murphy*, 109 U. S. 238, and that the statute under construction in that case, namely, section 2931 of the Revised Statutes (now repealed)

which applied to customs duties and not to internal revenue, was similar to sections 3226 and 3227 R. S. in all essential particulars. Section 2931, the customs statute which was involved in the case of *Arnson* v. *Murphy,* supra, is quite different from the internal revenue statutes. In the Arnson case the court said, page 241:

> By reference to the fourteenth section of the act of 1864, now Section 2931 Rev. Stats., it will appear that the written protest must be made within ten days, and the appeal to the Secretary of the Treasury within thirty days, from the ascertainment and liquidation of the duties by the proper officer. The decision of the Secretary on such appeal shall be final and conclusive, unless within ninety days after it was made suit is brought, and no suit shall, in the meantime, pending the appeal, be brought, unless the decision by the Secretary shall be delayed more than ninety days from the date of the appeal, if arising upon an entry at any port East of the Rocky Mountains.
>
> It appears to us quite plain, from the reading of the statute, that no action arises to the claimant, in such cases, until after decision against him by the Secretary of the Treasury, and that his suit against the Collector is barred unless brought within ninety days after an adverse decision upon his appeal, but, with the proviso, that if such decision is delayed more than ninety days after the date of his appeal, it is at the claimant's option either to sue, pending the appeal, treating the delay as a

denial, or to wait until a decision is in fact made, and then sue within ninety days thereafter.

It will be noted from a careful examination of section 2931 of the Revised Statutes that no limitation is put upon the right of the claimant to sue after the claim had been pending before the Secretary of the Treasury for ninety days. Under that statute, if the claim is pending for ninety days or longer, the claimant may sue at any time while the claim is pending, and within ninety days after an adverse decision by the Secretary of the Treasury. By sections 3226 and 3227, Revised Statutes, applying to internal revenue, the taxpayer may not sue until after an appeal has been made to the Commissioner of Internal Revenue and a decision rendered thereon, unless such decision is delayed for more than six months from the date of such appeal, then the same as in the Arnson case, the taxpayer may sue, but under section 3227 he may not sue at any time he may choose before the Commissioner renders his decision, but *only within two years next after the cause of action accrues.* His cause of action first accrues when he first has a right to sue, namely, six months after appeal to the Commissioner, as in *Wright* v. *Blakeslee*, and after that time he may sue at any time while his appeal is pending, provided he sues within two years. Two years, therefore, is the limit upon the time in which he may sue, during the time his appeal is pending before the Commissioner. If the decision of the Commissioner is rendered in the meantime, it

does not stop the statute from running, nor is there any period after the decision of the Commissioner in which the taxpayer may bring suit, which does not date from six months after the claim was filed.

The case of *Merck* v. *Treat*, therefore, seems to have been based upon a wrong conception of the statute because it treats the statute which was under consideration in the *Arnson* v. *Murphy* case as being a similar statute, *whereas there is no limitation in the statute under consideration in the Arnson v. Murphy case upon the right of the claimant to sue while his appeal is pending.*

On page 11 of its original brief appellant cites two opinions of the Attorney General:

1. 22 *Opinions of Attorney General*, 320.
2. 23 *Opinions of Attorney General*, 341.

In the first opinion the Attorney General also said:

> SIR: In your letter of October 1, 1898, which I have the honor to acknowledge, you submit the following questions for my opinion:
>
> First. Are the undivided profits of a national bank to be excluded in all cases from the capital and surplus in estimating the amount of special tax required to be paid by the bank under section 2 of the war revenue act?
>
> Second. Are the undivided profits of a State bank to be excluded in all cases from the capital and surplus in estimating the amount of special tax required to be paid by the bank under that section?
>
> Third. Are the undivided profits of private banks or bankers to be excluded in all cases

from the capital and surplus in estimating the amount of special tax required to be paid by the bank or bankers under that section? (P. 320.)

* * * * *

The purpose of the law is, undoubtedly, to levy an annual tax upon the business of banks and bankers, and, in order to make uniformity, to apply the tax to the amount of capital employed together with such surplus funds of the bank as are used in carrying on the business and which, combined with the capital, constitute the basis of banking operations.

The national banking act provides for the maintenance by national banks of what is called a "surplus," which is required to be set apart by the directors of the bank from the net profits until it shall reach an amount equal to 20 per cent of the capital stock. This surplus thus constituted becomes, by law, in effect a part of the bank's capital, and this 20 per centum is the minimum amount of surplus to be maintained by a national bank.

I do not conceive, however, that the amount of the capital with this surplus added would make the limit to which the taxing power is authorized to go in every instance in estimating the amount upon which the bank should be assessed. I understand the term "surplus" as applied to banks have a broader meaning, and it should be construed to include, not only that set apart as the minimum surplus, but also such amount as has been set apart by a vote of the directors or other authorized action of the bank to strengthen

the capital, and is thus held out by the bank in its dealings with the public as a part of its banking capital. The capital of a bank, together with the surplus so set apart and used in conjunction therewith as the basis of its business transactions and its banking operations, constitutes the security upon which customers rely and which induces the public to deal with it. (Pp. 321 and 322.)

The undivided profits of a bank signify the amount of money on hand out of which dividends may be declared, and such profits may be in the bank to-day, and, by action of the directors, distributed among the stockholders to-morrow, and thus cease to be within the control of the bank at all. It certainly could not have been the purpose of Congress to levy an annual tax upon funds of this character. (P. 323.)

And then so far as the taxation under the war-revenue act is concerned, it is not important whether a bank has any profits or not. It is, as before stated, the capital of the bank and other funds belonging to it, which by law or the action of the bank authorities assume the character of capital and which the bank uses in carrying on its business, that the law has in view as a subject of taxation. (P. 323.)

In the second opinion, the Attorney General said:

It is true that the word "surplus", in its general and popular meaning, would include undivided profits; for the excess of receipts over disbursements is, in a certain sense, surplus or profits, but it could be said with equal force

that the profits of a bank are part of its working capital if not distributed as dividends, and yet it can not be contended that, for purposes of banking, undivided profits constitute a part of the capital of a bank in the sense in which the word "capital" is ordinarily and generally used. (P. 343.)

It is thus apparent that the word "surplus" means a distinct and special fund, plainly recognized by statute, and which must exist independent of the fund called "undivided profits" as a condition for the payment of dividends, and the Comptroller in requiring quarterly reports from national banking institutions requires this distinction to be observed. It is true that the present claimants are not national banking institutions and have no "surplus" fund, but Congress did not mean that the expression surplus should mean one thing when applied to national banks and another when applied to state banking institutions or trust companies. The only question, therefore, is whether Congress when it provided by section 2 of the Revenue Law of 1898 that bankers should pay a special tax, and when it provided that, "in estimating capital, surplus shall be included," meant a surplus in the restricted and technical sense with which Congress had used it in the national banking laws and in which banking institutions of every kind use the term, or whether Congress had reference to every form of excess of receipts over disbursements (p. 344).

> I am clear that Congress used the word "surplus" in its technical and restricted sense, of a fund formally set apart and called surplus by the authorized officers of the bank, and the previous opinion of this Department, of February 4, 1899, is to be so understood (p. 344).

The Attorney General seemed to be clearly of the opinion that the words were used in their technical sense as when used with reference to national banks, holding that they would have the same significance when used with reference to private banks. Unfortunately for appellant the courts have adopted just the opposite meaning, to wit: That these words are used in a general sense because of the fact that private banks are included.

The Circuit Court of Appeals takes this view in *Leather Manufacturers' National Bank* v. *Treat*, 128 Fed. 262.

See appellee's brief in No. 207, p. 35.

Also see the following cases in appellee's brief, in No. 208:

> *Anderson* v. *Farmers Loan & Trust Co.*, 241 Fed. 326 (p. 12).
>
> *Germantown Trust Co.* v. *Lederer*, 263 Fed. 672 (p. 14).
>
> *State Savings Bank* v. *City Council*, 98 Iowa 737 (p. 14).
>
> *State ex rel. Bank* v. *Board of Assessors, et al.*, 48 La. Annual Reports 35 (p. 15).
>
> *Leather Manufacturers' National Bank* v. *Treat*, 128 Fed. 262 (p. 19).

LIMITATIONS.

The weight of authority now is that the statute of limitations as to personal actions affects only the remedy and does not extinguish the right.

Michigan Ins. Bank v. *Eldred*, 130 U. S. 693.
Wood on limitations, 4th edition, vol. 1, page 3, which cites many cases.

Statutes of limitations are statutes of repose and do not extinguish the debt but only bar or suspend the remedy.

Wood on limitations, 4th edition, vol. 1, p. 304, which cites Federal and State cases.

The appellee submits that the Merck case was not well considered in that it overlooked the clause "next after the cause of action accrued." That the ~~Ander-~~ Anderson case is entirely different from the case at bar and should not have been relied upon by the court in deciding the Merck case.

That the opinions of the Attorney General are in a large degree favorable to the appellee, and that part which is not is squarely against many decisions which appellee has cited, and therefore the judgment of the lower court should be affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.
ROBERT H. LOVETT,
Assistant Attorney General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 208.

FIDELITY TITLE AND TRUST COMPANY OF PITTSBURGH, PA., *Appellant*,

vs.

UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF IN REPLY.

SIMON LYON,
R. B. H. LYON,
Attorneys for Appellant.

GEORGE SUTHERLAND,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF IN REPLY.

The brief for the Government in this cause, in so far as it deals with the merits, is sufficiently met by appellant's brief heretofore filed, together with the brief for appellant in case No. 207, Fidelity & Deposit Company of Maryland v. United States, which this appellant has adopted and relies upon.

Counsel for the Government, however, has again discussed at great length the question of the statute of limitations, and again insists that Section 3227 of

the Revised Statutes (which fixes the two-year period), instead of Section 1069 Revised Statutes (which fixes a six-year period), furnishes the applicable rule. We have already pointed out that this contention is directly opposed to the decisions of this Court. See the appellant's reply brief in No. 207.

The effect of the Government's contention is to ask the Court to again review the question and overrule its former decisions. While we assume that the Court will adhere to its former decisions, we submit, nevertheless, that even under Section 3227 Revised Statutes, the actions are not barred. The authorities in point upon this proposition are not entirely harmonious, but an examination of them we feel sure will demonstrate not only that the line of cases supporting our position have behind them the greater weight of reason, but are moreover, based upon the express decisions of this Court.

Arnson v. Murphy, 109 U. S. 238, 242. This Court dealing with a statute of similar character to that relied upon by the Government, in the course of its opinion, said:

> "It appears to us quite plain, from the reading of the statute, that no action arises to the claimant, in such cases, until after a decision against him by the Secretary of the Treasury; and that his suit against the collector is barred unless brought within ninety days after an adverse decision upon his appeal; but with the proviso, that if such decision is delayed more than ninety days after the date of his appeal, it is at the claimant's option either to sue, pending the appeal, treating the delay as a denial, or to wait until a decision is in fact made, and then sue within ninety days thereafter. It can not be that he is obliged, in

case for any reason a decision at the Treasury Department is delayed beyond the appointed time, to treat the delay as an adverse decision, and to bring his suit while the matter is still *sub judice.*" * * *

"The whole purpose of the saving in his favor evidently is, that he shall not be required to wait longer than ninety days after his appeal for an adjudication. There is nothing to forbid his waiting, without suit, as long as he has reason to expect a favorable decision upon his appeal."

In Merck v. Treat, 174 Fed. Rep. 388, the precise question was presented to the Circuit Court of Appeals for the Second Circuit. That Court in the course of a well reasoned opinion and basing its decision upon Arnson v. Murphy, *supra,* and another decision of this Court, held that the statute did not begin to run until the decision of the Commissioner, saying:

"We think Congress intended to give the appellant the right to wait for the decision of the Commissioner, especially if he has reason to believe that it will be in his favor. Congress could not have intended to offer him the alternative of losing his claim or else commencing an expensive litigation which prevents a decision which may sustain his contention and for which he is entirely willing to wait. A construction which compels the claimant, upon pain of forfeiting all his rights, to sue within two years and six months from the appeal to the Commissioner and while that official is duly considering the questions involved, seems to us unreasonable. * * *

Certainly the Government which holds the money cannot, from a pecuniary point of view, be injured by the delay. If, however, the Commissioner thinks otherwise he has the remedy in his own hands, he has but to decide the controversy

and the period of limitation will immediately begin. * * *

If the latter official renders a decision against him he must bring suit within two years from the date of such decision."

This was done in the instant case, the claim having been rejected May 8, 1917 (Finding 3, Record 22), and suit filed July 25, 1918 (Record 1), and therefore was within the time limit fixed by Section 3227 of the Revised Statutes.

The provisions of Section 3227 of the Revised Statutes were again considered by the same Court in New York Mail and Newspaper Transportation Company vs. Anderson, Collector, 234 Fed. Rep. 590, 594, and the same conclusion announced:

"Under Section 3227 the date of accrual is the date when the Commissioner decides adversely to the taxpayer.'

See also Hicks vs. James, 110 U. S. 274.

Respectfully submitted,

SIMON LYON,
R. B. H. LYON,
Attorneys for Appellant.

GEORGE SUTHERLAND,
Of Counsel.

FIDELITY TITLE & TRUST COMPANY, PITTSBURGH, PENNSYLVANIA, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 208. Argued April 21, 1922.—Decided May 29, 1922.

1. The limitation on actions in the Court of Claims on claims arising under the Refunding Act of July 27, 1912, is six years. P. 305. *Fidelity & Deposit Co.* v. *United States, ante,* 296.
2. In an action in the Court of Claims by a corporation engaged in banking and other kinds of business, to recover bankers' taxes collected under the Act of June 13, 1898, c. 448, § 2, 30 Stat. 448, upon the ground that its capital was not used or employed in banking, the burden is on the plaintiff to prove that none of it, or less than the amount for which it was assessed, was used or employed in its banking department. P. 306. Cf. *Fidelity & Deposit Co.* v. *United States, ante,* 296.
3. This burden is not sustained where the business and assets of the several departments were not separated, where the proportions of capital and accumulated profits used in the respective departments were not shown, where there was no finding that the net profits of the banking department came solely from the use of depositors' money, and where a finding that no part of the capital and accumulated profits was used in banking, or findings from which the proportion so used, if any, could be determined, were not requested. P. 306.
4. In providing that, in estimating capital, surplus shall be included, the Act of 1898, *supra,* takes no account of the technical distinction between surplus and undivided profits often made by banking corporations, but embraces all capital used or employed in banking, including funds designated as undivided profits. P. 307.

55 Ct. Clms. 535, affirmed.

APPEAL from a judgment of the Court of Clams dismissing a petition for recovery of money paid as bankers' special taxes under the Spanish War Revenue Act of June 13, 1898.

Mr. George Sutherland, with whom *Mr. Simon Lyon* and *Mr. R. B. H. Lyon* were on the briefs, for appellant.

Mr. Assistant Attorney General Lovett, with whom *Mr. Solicitor General Beck*, *Mr. Carl A. Mapes* and *Mr. B. H. Littleton* were on the briefs, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This suit was brought in the Court of Claims by the Fidelity Title & Trust Company of Pittsburgh, in July, 1918, to recover the sum of $10,028.94 assessed upon its whole capital and undivided profits and paid as bankers' special taxes under § 2 of the Spanish War Revenue Act. That court entered judgment for the defendant; and the case is here on appeal. Appellant contends that nothing was payable as a tax, because none of the capital or undivided profits was used or employed in banking; and that the tax was, in no event, assessable on the undivided profits, because these were not a part of the capital within the meaning of the act. The Government contends that the whole capital and undivided profits were taxable; and that, in any event, the action is barred by the two-year statute of limitations, because the application for refund had been made in November, 1913. In the main, the facts are similar to, and the questions of law are the same, as those considered in *Fidelity & Deposit Co.* v. *United States*, *ante*, 296. For the reasons there stated we hold that the action was not barred. As bearing upon the merits material differences in the facts must be considered. In the case now under consideration, the businesses and the assets of the several departments were not separated; and there was not technically a surplus, but a fund designated as undivided profits.

The company carried on five classes of business, one of which was banking. An amount in excess of its capital was permanently invested in bonds and real estate, the latter including its office building. A schedule of these investments was carried on the books designated "Sched-

ule of Investments of the Capital Stock of One Million Dollars"; but there was no physical segregation of these assets from others belonging to the company. Nor was there segregation of the money received from the capital stock or from investments made therewith, from the money derived from earnings of the several departments. No attempt was made to segregate or earmark investments as having been made for any particular department. All moneys received by the company, including bank deposits, were commingled; and from these general funds all investments were made and all expenses and losses were paid. The office building was used by all the departments. All the earnings from the several departments were pooled and went into the profit and loss account. There was carried in this account a credit representing undivided profits amounting in 1898 to $414,468.86, which increased from year to year and was $948,074.56 in 1902. These undivided profits were not at any time during the period in question set apart in any way as a separate fund and they were at all times subject to distribution by the board of directors as dividends and available for any department of the business. At a date subsequent to the period here in question additional stock was sold above par to form a surplus fund.

The burden lay on the plaintiff to establish that none of the company's capital, or that less of it than the amount for which it was assessed, had been used or employed in the banking department. It failed entirely to sustain that burden. The proportions of capital and accumulated profits used in the respective departments were not established by the evidence. There was no finding that the net profits of the banking department were received solely from the use of depositors' money. And there does not appear to have been any request for a finding of fact that no part of the capital and undivided profits was used in banking; or for a finding of facts from

which the proportion so used, if any, could be determined. Therefore the Court of Claims properly denied recovery for any part of the taxes paid; unless we can say, as matter of law, that undivided profits, on which for the years 1898 and 1901 taxes were assessed as upon capital, were not assessable as such.

The act declares that "in estimating capital surplus shall be included" and that the "annual tax shall in all cases be computed on the basis of the capital and surplus for the preceding fiscal year." The act does not mention undivided profits. The question is whether Congress intended to draw a distinction between surplus and undivided profits; or intended that all capital actually used in banking should be taxed, whether it was strictly capital stock, or surplus or undivided profits.

The company argues that while the word surplus, in its general and popular meaning, includes undivided profits, Congress in the Act of 1898 used the term in its technical and restricted sense of a fund formally set apart and called surplus by the authorized officers of the bank; and that, as matter of law, no tax can be assessed on undivided profits. This view finds support in opinions of the Attorney General rendered in 1899 and 1900. 22 Ops. Atty. Gen. 320; 23 Ops. Atty. Gen. 341. But his rulings were not acquiesced in by the Treasury Department. It recommended promptly an amendment of the act which should expressly declare that undivided profits were to be considered surplus, Annual Reports of Commissioner of Internal Revenue, 1899, p. 91; 1900, p. 89; and it submitted the question thereafter to the courts for determination. In *Leather Manufacturers' National Bank* v. *Treat*, 116 Fed. 774 (1902), the Circuit Court held that undivided profits were subject to taxation; and the judgment in that case was affirmed by the Circuit Court of Appeals for the Second Circuit, 128 Fed. 262 (1904).

With these courts we agree. By the Act of 1898 Congress imposed the tax, not on incorporated banks only, but also on any person, firm or company engaged in banking. And it measured the tax by the amount of capital actually used or employed in banking. The technical distinction between capital, surplus and undivided profits is obviously not applicable to the banking business when conducted by individuals or firms; and the distinction between surplus and undivided profits, while commonly observed by incorporated banks, is not ordinarily made by other business corporations. As it is the use or employment of capital in banking, not mere possession thereof by the banker, which determines the amount of the tax, the fact that a portion of the capital so used or employed is designated undivided profits is of no legal significance.[1] Compare *Fidelity & Deposit Co. v. United States, ante,* 296.

But while capital assets of a banker are not, as matter of law, exempt from taxation under the Act of 1898 merely because they are designated undivided profits, undivided profits, like any other part of the company's capital, may be free from the tax, because they were not, in fact, used or employed in banking. And the company contends that the Court of Claims did find as a fact that these undivided profits were not so used. The passage in the findings relied upon is this: "The said profit and loss credit balance was never designated as or set apart or appropriated to capital or surplus or used for capital or surplus purposes." It is argued that the last clause of the sentence means that none of the undivided profits were used for banking purposes. The contention is plausible. But

[1] The Revenue Act of October 22, 1914, c. 331, 38 Stat. 745, 750, provides in terms that undivided profits shall be included in capital. It is under this act that *Anderson* v. *Farmers' Loan & Trust Co.*, 241 Fed. 322, 327; *Real Estate Title Insurance & Trust Co.* v. *Lederer*, 229 Fed. 799; *Germantown Trust Co.* v. *Lederer*, 263 Fed. 673, relied upon by the Government, were decided.

304. Syllabus.

when the passage is read in connection with other parts of the findings, it seems clear that such was not the meaning of the court. There was, thus, no finding to the effect that the undistributed profits, as distinguished from capital, were not used or employed in banking.

Affirmed.